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Family Law: Husband and Wife

Joseph W. McKnight

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FAMILY LAW: HUSBAND AND WIFE

Joseph W. McKnight*

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I. STATUS

A. NON-MARITAL UNIONS

IN response to discussion of statutory recognition of single-sex civil unions the principal complaint is that the proposal detracts from the sanctity of marriage. The principal and overwhelming detraction from the sanctity of marriage is divorce. Mere recognition of divorce detracts from the sanctity of marriage and puts the matter in the banal hands of the parties, aided by judges and the troops of the bar. Abolishing divorce now, or even discouraging it, seems beyond possibility. Nor does there seem to be any likelihood of tightening its rules.¹

Unisexual unions do not meet the definition of marriage as understood for as long as written records extend. Those who have formed unisexual unions want (1) recognition of their societal status, which seems reasonable enough and is already happening, and (2) the benefits that our society offers to those who are married, an objective in need of careful study as to credibility and consequences. If the latter is the only aim under current discussion, the proposed net may not be cast widely enough. The proposal merely extends the benefits of marriage to stable single-sex unions whose bond is essentially sexual but otherwise resembles marriage in other respects. The bonds of marriage, of course, go far beyond sexuality. The element of dependence and the training of children (ordinarily including their procreation) are also traditional hallmarks of the institution. These characteristics (apart from procreation) can also be present in unisexual civil unions, with the availability of adoption and a widened scope

1. One exception is several states' experiments with covenant marriage, although the results of these attempts have been negligible. See Cynthia DeSimone, Comment, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse Has Stifled the Effort to Strengthen Marriage*, 52 CATH. U. L. REV. 391 (2003).

of in vitro fertilization in the case of unions between women.² But there are other significant types of unions (albeit not sexually bound) that share the responsibilities of mutual dependence and child rearing. The most notable of such relationships are those of (1) the child who lives with and supports a parent and the child's younger siblings, and (2) the widowed parent who provides for minor children as a consequence of marriage without enjoying its financial benefits. Extending the financial and social benefits of marriage to those who are unisexually joined by law will also have a considerable financial impact. Are such changes needed by the nature of the unions involved? Sexual attachment and practice would thus be the exclusive factors in extending the legal protections and benefits of marriage; other equally worthy sorts of dependency would be excluded merely on the apparent grounds of our preoccupation with a sexual test of interdependence.

Several states have already extended legal protections and legal incidents to dependent relationships based on unisexual civil unions.³ Those opposing the constitutional consequences of mobility of such couples have achieved the passage of the Defense of Marriage Act (DOMA)⁴ and, in Texas, the enactment in 2003 of Family Code Section 6.204.⁵ DOMA provides that full faith and credit under Article IV, Section 1 of the United States Constitution is not required of a state in relation to unisexual unions created and recognized in another state. The very reasonable concern that such legislation might be declared unconstitutional has provoked the proposal of a Constitutional amendment to cover this subject.⁶ In light of our experience with the Constitutional prohibition of the sale of alcohol for convivial uses long established by social custom, this tack of impetuous legal response should cause considerable concern.

A local response to this issue is illustrated by an effort to achieve a divorce between two males in a unisexual union achieved in Vermont.⁷ A district court in Orange County granted the uncontested petition for divorce and agreed division of property. The Texas Attorney General then intervened in the case and achieved a dismissal of the suit.⁸ Thus the position of the Attorney General on that issue seems already determined. The American Law Institute has proposed a domestic relationship statute

2. See Stacy Finz, *Estranged Lesbians Battle for Custody of Twins: Courts Must Decide if Egg Donor Should Have Parental Rights*, SAN FRANCISCO CHRON., Dec. 5, 2003, at A1, for a novel case in California's Seventh Court of Appeals.

3. See VT. STAT. ANN. tit. 15, §§ 1201-07 (2003); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999); *Baehr v. Lewin*, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Ct. App. 1996), *enforcing Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *aff'd*, 950 P.2d 1234 (Haw. 1997);.

4. DEFENSE OF MARRIAGE ACT (DOMA), 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000).

5. TEX. FAM. CODE ANN. § 6.204 (Vernon 2003).

6. See, e.g., President George W. Bush, State of the Union Address (Jan. 20, 2004) available at <http://www.whitehouse.gov/stateoftheunion/2004/>.

7. See Melissa Drosjack, *Beaumont Judge Asked to Overturn Gay Divorce*, HOUSTON CHRON., Mar. 28, 2003, at 36.

8. See *id.*

on this matter,⁹ and professional literature continues to pile up on the shelves.¹⁰

B. INFORMAL MARRIAGE

The fact of an informal marriage has been asserted and rejected in two appellate cases concerning sexual assault of a child.¹¹ Section 2.401(c)¹² was enacted in 1997 to "eliminate common-law marriage as a defense to statutory rape."¹³ In *Kingery v. Hintz*,¹⁴ a man convicted for having sexual relations with his girlfriend's fifteen-year-old daughter brought suit for divorce in an effort to achieve a civil sanction for his previously condemned act. Sustaining the divorce court's rejection of his petition, the Houston Fourteenth District Court of Appeals relied on Section 2.401(c) to deny the victim's capacity to marry and cited the legislative committee's bill-summary prepared prior to its passage.¹⁵ The petitioner relied on the circuitous argument that the victim's status as an adult had been achieved by the marriage which he sought to prove. In rejecting the argument that emancipation had been achieved under Section 1.104,¹⁶ the court pointed out that "the Family Code emancipates a minor only after she has been married in accordance with the laws of Texas,"¹⁷ and the woman was not capable of entering into a marriage by virtue of Section 2.401(c).¹⁸

In an appeal from a conviction for having sexual relations with a child (the man's girlfriend's niece in this instance), the prisoner sought to rely on the victim's being his wife by informal marriage.¹⁹ Without citing Section 2.401(c), the court rejected his argument after his failure to prove the

9. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-6.06 (2002).

10. E.g., Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. BAR J. 558 (2003); Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL'Y 301 (2003); *Symposium on the ALI Principles of the Law of Family Dissolution*, 201 BYU L. REV. 857 (2001); *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003); *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003).

11. TEX. PENAL CODE ANN. § 22.011(2) (Vernon 2003) (defining sexual assault of a child).

12. TEX. FAM. CODE ANN. § 2.401(c) (Vernon 2003).

13. HOUSE COMM. ON JUVENILE JUSTICES FAMILY & ISSUES, BILL ANALYSIS, TEX. H.B. 891, 75th Leg., R.S. (1997).

14. *Kingery v. Hintz*, 124 S.W.3d 875 (Tex. App.—Houston [14th Dist.] 2003, no pet. h.).

15. *Id.* at 877. In this instance, however, it can scarcely be doubted that the purpose of the bill was accurately set out in the report, though the court did not comment on the fact that these committee papers are all too often prepared by law students (who may have no prior training in this branch of the law) employed by the committee and the sponsor of the bill after no consultation with anyone else.

16. TEX. FAM. CODE ANN. § 1.104 (Vernon 2003) (granting adult rights to all married persons, regardless of age).

17. *Kingery*, 124 S.W.3d at 878.

18. *Id.*

19. *Johnson v. State*, 103 S.W.3d 463 (Tex. App.—San Antonio 2003, no pet.).

factual elements supporting the existence of the marriage.²⁰

Two recent unpublished²¹ appellate cases raised significant questions of factual interpretation. In both of these cases, the alleged husband unsuccessfully appealed from a finding of an informal marriage. In a third case, *Maldonado v. Maldonado*,²² the alleged wife was the unsuccessful appellant in a case in which the trial court failed to find an informal marriage. The couple had lived together for thirteen years. The woman had nevertheless left the man for four months before they had children and on several later occasions. After the birth of two children, the couple were ceremonially married, and one child was born thereafter. The principal property issue (the title to a home) turned on whether an informal marriage existed before the husband bought the home in July of 1992. In his suit for divorce, the husband merely alleged that the couple had ceremonially married in 1995. The wife filed a counter suit, alleging that an informal marriage had occurred before the purchase of the house. The husband testified that they were married in 1993 or 1994. There was further evidence that the husband had said in the course of counseling that they had had a "common-law" relationship for nine years, that is, since about 1993. The trial court (though making no findings of fact) evidently found insufficient facts to support the prerequisites of an informal marriage under Section 2.401(a)(2).²³

In *Palacios v. Robbins*,²⁴ the alleged wife, as petitioner for divorce, asserted an informal marriage in September of 1993. She testified that she and her husband had agreed to an informal marriage about that time and afterwards told her parents that they were married and expecting a child. In various documents executed between 1996 and 2000 the man indicated that he and the woman were married. Though the man argued that all elements of fact to support an informal marriage had not existed at the same time, the appellate court sustained the jury's conclusion that the couple were informally married.²⁵ The court seems to have concluded that the agreement to be married subsisted as the two other elements subsequently gave the agreement its necessary components for completion.

The most troublesome of these informal marriage cases, *Omodele v.*

20. *Id.* at 464.

21. See TEX. R. APP. P. 47.7 (clarifying the difference between a published and an unpublished case); see *Bloch v. Dowell Schlumberger, Inc.*, 925 S.W.2d 301, 303 (Tex. App.—Houston [1st Dist.] 1996, no writ).

22. *Maldonado v. Maldonado*, No. 04-02-00818-CV, 2003 WL 21653876 (Tex. App.—San Antonio, July 16, 2003, no pet.).

23. *Id.* at *6-7. See TEX. FAM. COD. ANN. § 2.401(a)(2) (Vernon 2003) for the requirements of an informal marriage.

24. *Palacios v. Robbins*, No. 04-02-00338-CV, 2003 WL 21502371 (Tex. App.—San Antonio July 2, 2003, pet. denied).

25. *Id.* at *3-4.

Adams,²⁶ dealt with the application of Section 6.202²⁷ and thus may presuppose a logical dilemma. That section states that a formal or informal marriage entered into while there is an absolute impediment of a prior marriage of a party²⁸ will become valid when the impediment is removed if the parties continue to live together as husband and wife and publicly acknowledge themselves as such. If both parties knew about the impediment (and one of them usually knows of his or her own impediment)²⁹ and entered into an agreement to marry knowing that it was void, such an agreement cannot be a present agreement of marriage. The agreement to marry at the present time is essential for an informal marriage. If only one party knows of the impediment, there can be a putative marriage in favor of the innocent spouse, but the marriage is nonetheless void until the impediment is removed. The application of Section 2.402 to this situation can therefore be understood to protect the innocent spouse. Hence, the agreement to be married cannot be entered into by both alleged spouses unless one lacks knowledge of the impediment. The lack of necessary prior agreement operates in either a ceremonial or an informal marriage; knowingly acquiring a license to marry ceremonially, despite a known impediment, does no more to validate a ceremonial marriage than an exchange of a false promise to be presently married when its impossibility is known by both parties in the case of an informal marriage. This point has nevertheless been ignored in applying Section 6.202 because of what are commonly regarded as the curative properties of informal marriage. *Omodele* was evidently such a case. There the trial was concluded in the man's absence³⁰ though he had unsuccessfully sought a continuance so that he might appear.³¹ Thus, even if relevant, there was no inquiry into the woman's knowledge of the man's inability to contract a present marriage. The court therefore lacked vital facts for determining whether a subsisting informal marriage could have occurred. In this instance, the character of matrimonial property turned on the time at which *all* the elements of the informal marriage had occurred. The family home could have been community property only if it was acquired by the husband during the alleged informal marriage. At the time the house was acquired, the parties held themselves out publicly (and in writing) as mar-

26. *Omodele v. Adams*, No. 14-01-00999-CV, 2003 WL 133602 (Tex. App.—Houston [1st Dist.] Jan. 16, 2003, no pet.).

27. TEX. FAM. CODE ANN. § 6.202 (Vernon 2003) (declaring marriage void if either party has an existing marriage).

28. The statute refers merely to all subsisting impediments and does not state what kind. There are two kinds of diriment impediments in such cases: a prior marriage of one or both parties and blood relationships of the parties that makes the union invalid. Because the latter impediment cannot be removed, the statute (though somewhat imprecisely drawn) can only refer to the impediment of a subsisting prior marriage.

29. There are situations, however, when neither party is aware of the impediment, such as when a previously married person believes in good faith that his or her prior spouse has brought a successful suit for divorce, but the divorce was not in fact granted, and then marries another person who also believes that the other's divorce was granted.

30. *Omodele*, 2003 WL 133602, at *3.

31. *Id.* at *5.

ried and lived together as husband and wife.³² The promise to marry may have been deduced from that evidence as the court said that it might be in *Russell v. Russell*.³³ But if the husband alone knew of the impediment, *his* ability to make a present promise to marry did not exist. If both parties were aware of the man's impediment to marry, how could both enter into a contract to be married *presently*? If the agreement was to be married after the impediment was removed, it was not an agreement for a *present* marriage as the doctrine of informal marriage requires.³⁴

In *Frazier v. McKiernan*³⁵ the couple's ceremonial marriage had been dissolved by divorce in California in 1971. The couple nevertheless continued to live together there. In 1981, the man moved to Texas where the couple later cohabitated and agreed to be married. In her Texas divorce proceeding, the woman asserted an informal marriage, about which the third element (public holding out of marriage in Texas) was apparently uncontested. In the trial court and on appeal, some argument seems to have been made with respect to whether their cohabitation began in California or in Texas.³⁶ Just why this point was relevant was not explained, but it may have been argued that if cohabitation as an element began in California, it could not have satisfied Texas law because California does not recognize the institution of informal marriage. But the trial court found an informal marriage and the appellate court affirmed that conclusion. If it had been cited, *Durr v. Newman*³⁷ would have inferentially supported this holding. In *Durr* the couple had satisfied all the elements of a Texas informal marriage but while the man was still married to someone else. While the couple was on a temporary stay in Nevada where informal marriage is not recognized, the couple learned that the husband's prior marriage had been dissolved and the couple continued to cohabit there as husband and wife and to hold themselves out as married. The woman then returned to their home in Texas. Before the man's return, he was killed in an airplane crash in Arizona. The woman thereupon sought to be appointed administratrix of his estate as his surviving wife. The El Paso Court of Civil Appeals held that the impediment to the marriage of the cohabitating couple had been removed by the husband's divorce, and the invalid informal marriage became valid as the couple continued to cohabit and hold themselves out as married under Section 2.22 of the Family Code of 1969 (now Section 6.202).³⁸ The past acts established an informal marriage, albeit an invalid one. Thus, though the continued cohabitation and holding out occurred outside Texas, the re-

32. *Id.* at *3.

33. *Russell v. Russell*, 865 S.W. 2d 929 (Tex. 1993).

34. See TEX. FAM. CODE ANN. § 2.401(a)(2) (Vernon 2003).

35. *Frazier v. McKiernan*, No. 13-01-00004-CV, 2003 WL22069790 (Tex. App.—Corpus Christi Sept. 4, 2003, no pet. h.).

36. *Id.* at *1.

37. *Durr v. Newman*, 537 S.W.2d 323 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 31 Sw. L.J. 105, 106 (1977).

38. TEX. FAM. CODE ANN. § 6.202 (Vernon 1998).

quirements of Section 6.202, does not require compliance within Texas. Hence if the essential elements of the informal marriage had already satisfied Texas law, it was beside the point that the validating event occurred outside Texas while the parties were temporarily absent from the state. As both the trial and appellate courts had evidently concluded in *Frazier*, the past California cohabitation was irrelevant in Texas, provided that their living together as husband and wife in Texas and public acknowledgment of their marriage in Texas has been proved.³⁹ There is no requirement that all of the period of cohabitation must be spent in Texas. Thus the informal marriage was proved. All the elements evidently existed over the same period of time.⁴⁰

C. STATE EMPLOYMENT

The Texas nepotism statute⁴¹ provides an exemption from the general rule against hiring of a person within prohibited degrees of relationship to the officer with the sole authority of hiring if that person is already serving in office prior to the time that the familial relationship arises. Thus if a sheriff and an employee of the sheriff's office are married while the sheriff is in office, the employee does not fall within the nepotism rule.⁴²

The issue of sole authority of a public official to hire or assign employees is the principal point on which application of the nepotism statute rests. If a school board has the sole authority to hire school employees, a close relative of a member of the board is therefore within the operation of the nepotism law. But if the board delegates that authority to hire or assign to the school superintendent, the familial relationship to the superintendent becomes the controlling rule.⁴³ Hence the superintendent may reassign a person within a prohibited degree of relationships to a board-member but not to the superintendent.⁴⁴

The fundamental issue in these disputes is the question of where the sole authority for making personnel decisions resides. In a further opinion the Attorney General dealt with the application of the nepotism statute to the hiring of the spouse of the president of Stephen F. Austin State University by the Board of Regents of that university. In that instance because the Board has the sole *authority* to make such appointment (and not the President), "if the president of SFA exercises any role in hiring university employees, he does so only as an employee and not as a public official." Thus, the current interpretation of the nepotism statute seems

39. TEX. FAM. CODE ANN. § 2.401(a)(2) (Vernon 1998).

40. See *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1991, no writ.).

41. TEX. GOV'T CODE ANN. 573.062 (Vernon 1994).

42. TEX. ATT'Y GEN. OP. GA-0121 (2003).

43. See *Peña v. Rio Grande City Consolidated Indep. Sch. Dist.*, 616 S.W.2d 658, 660 (Tex. Civ. App.—Eastland 1981, no writ.).

44. TEX. ATT'Y GEN. OP. GA-0123 (2003) (hiring of a bus driver and reassignment of a teacher).

to turn not on actual or de facto exercise of employment powers but merely on *de jure* authority which may be exercised at the whim of the ultimate public authority.

D. INTERSPOUSAL TORTS

In *Palacios* the wife brought an independent cause of action for recovery for her husband's improper depletion of community assets and for his infecting her with a sexually transmitted virus.⁴⁵ By the most restrictive reading of the Texas Supreme Court's decision in *Schlueter v. Schlueter*,⁴⁶ such handling of property is to be taken into consideration by a divorce court in dividing the community property but not to provide grounds for independent monetary recovery.⁴⁷ In this process such a "fraud on the community estate" may be termed a right of reimbursement in favor of the community.⁴⁸ As to the wife's action for assault for the man's forcing himself on her for unprotected intercourse and thus infecting her with herpes, the court let the monetary judgment stand as reduced from \$200,000 to \$100,000 as the wife agreed.⁴⁹

In *Jones v. Beszborn*⁵⁰ a man petitioned for divorce alleging an informal marriage. The allegation was not proved, and the man thereafter amended his petition to include a cause of action for conversion.⁵¹ If the informal marriage had been proved, the conversion would seem to fall within the rule of *Schlueter*, which involved a fraudulent transfer to the husband's father who was a party to the proceeding.⁵² In that instance an independent tortious recovery for interference with property interests was rejected, but a claim for reimbursement provides an alternative that produces a more precise result than leaving the complaint to be considered in an equitable property division. Community reimbursement increases the size of the community estate and, in the course of a claim for "economic contribution" under Section 4.201, gives a lien as well. In the

45. *Palacios v. Robbins*, No. 04-02-00338-CV, 2003 WL 21502371, at *4, 6 (Tex. App.—San Antonio, July 2, 2003, no pet.).

46. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998); see also Joseph W. McKnight, *Family Law: Husband and Wife*, 52 SMU L. REV. 1143, 1149 (1999).

47. The court relied on *In re Marriage of Moore*, 890 S.W.2d 821, 828 (Tex. App.—Amarillo 1994, no writ), stating that "a trial court may award a money judgment in favor of one spouse against the other to achieve an equitable division of the community estate." *Schlueter*, 975 S.W.2d at 588. But such a power is limited by the *availability* of community assets to divide. See *Carnes v. Meador*, 533 S.W.2d 365, 371 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). Thus if there are community assets of \$25,000, the court cannot award a money judgment for \$100,000 except as an independent tortious recovery. But if a third person, as recipient of such community funds, is joined as a party to the divorce proceeding and is thus the object of a community right of reimbursement, a money judgment may run against that party to disgorge the misappropriated community assets. See *id.*

48. *Schlueter*, 975 S.W.2d at 588.

49. *Palacios*, 2003 WL 21502371, at *6-7. The court held that the husband had failed to make a timely objection to the award of the wife's attorney's fee to exclude that portion involved in the recovery. Thus the attorney's fees stood as found. See *id.* at *7.

50. *Jones v. Beszborn*, No. 01-02-00524-CV, 2003 WL 1942317 (Tex. App.—Houston [1st Dist.], April 24, 2003, no pet.).

51. *Id.* at *1.

52. *Schlueter*, 975 S.W.3d at 586.

case of reimbursement of the separate estate, a monetary debt may be created which may also be secured under Section 4.201. The community claim for reimbursement, as part of the marital estate, is subject to equitable division upon divorce.⁵³ On death rather than divorce the community claim is not subject to equitable division and as long as the reimbursement debt is against the decedent's estate its discharge in bankruptcy is unavailable.⁵⁴

E. NON-MARITAL FIDUCIARY CONCERNS

An engagement ring is the modern counterpart of the Anglo-Saxon *wed* given as the security for a contract of marriage. This institution provides that if the giver of the ring renounces his promise of marriage, the recipient is entitled to keep the ring. On the other hand, if the recipient is unwilling to proceed with the marriage, the ring must be returned to the donor. Thus the transaction can be characterized as both a secured contract and as a conditional gift. In *Curtis v. Anderson*⁵⁵ the man sought the return of the ring from his former fiancée. The man's argument rested on his characterization of the transaction as a conditional gift and his further assertion that at the time the gift was made the woman had promised to return the ring if the engagement were broken off. The trial court granted the defendant a summary judgment, and the man appealed. The appellate court sustained the argument that the man's case must fail in the absence of a written agreement.⁵⁶ In 1997 the legislature enacted Section 1.108⁵⁷ to meet the threat posed by the California Supreme Court's decision in *Marvin v. Marvin*,⁵⁸ which seemed to hold that an oral agreement to share the gains of marriage is enforceable, and in a Texas context it was feared such an agreement might blossom into an informal marriage. But the common-law solution of the case is much easier to apply. At common law the recipient was bound to return the ring only if she broke the contract to marry. The man was bound to return the *wed* if he renounced his promise. If the facts developed at trial showed that the man had indeed broken the engagement, the woman would be entitled to retain her security.⁵⁹

In *Vogt v. Warnock*,⁶⁰ an elderly man and a much younger woman were engaged to be married in 1997. The man also hired the woman to manage

53. See *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988); *Morrison v. Morrison*, 713 S.W.2d 377, 379 (Tex. App.—Dallas 1986, writ dismissed); *Jones v. Jones*, 699 S.W.2d 583, 586 (Tex. App.—Texarkana 1985, no writ).

54. See *Colden v. Alexander*, 171 S.W.2d 328 (Tex. 1943); *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ refused n.r.e.); and *Dakan v. Dakan*, 83 S.W.2d 620 (Tex. 1935).

55. *Curtis v. Anderson*, 106 S.W.3d 251 (Tex. App.—Austin 2003, pet. denied).

56. *Id.* at 253-55.

57. See TEX. FAM. CODE ANN. § 1.108 (Vernon 2003) (requiring writing for enforceability of a promise or agreement made in consideration of marriage).

58. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

59. *Curtis*, 106 S.W.3d at 253.

60. *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.—El Paso 2003, pet. denied).

his financial affairs and provided her with a power of attorney by which she “assume[d] fiduciary and other legal responsibilities of an agent.”⁶¹ In 1998 the man transferred several tracts of realty to his fiancée, and, with their marriage still pending, the man died a few months later. His executor then sued the fiancée for the properties transferred. The El Paso Court of Appeals concluded that the power of attorney put the fiancée under fiduciary duty to treat her principal fairly and that she had the burden of proving that the transfers to her were fair. She was successful in that regard.⁶² It was not suggested that either party was at fault in frustrating the contract of marriage. But if transfers had been made in consideration of marriage and the marriage plans had been frustrated by the fault of neither party, the gift should have been treated as a nullity,⁶³ quite apart from the lack of a written contract to evidence the agreement.⁶⁴

F. HOMESTEAD OCCUPANCY OF SURVIVING SPOUSE

The right of a surviving spouse to occupy the family home for life or until abandonment of that right is one of the fundamental tenets of Texas family law.⁶⁵ Temporary non-use does not deprive the survivor of maintaining that right even if accompanied with short term rental of the premises to someone else provided that the survivor maintains an intention to return.⁶⁶ In *Ferguson v. Ferguson*⁶⁷ the deceased husband had devised to his widow his separate property house, in which they had made their home. In a dispute which arose between the widow and the decedent's executor concerning the separate or community character of other assets of the estate, the disputants reached an agreed judgment that the widow would have a cash payment and that she “shall have no further claim” against the estate or property of the estate.⁶⁸ The inventory of estate property following this term included the residence. Thereafter the executor demanded that the widow relinquish occupancy of the house for its sale. In the ensuing litigation the probate court found that the widow had *waived* her rights to the homestead by what it termed the unambiguous terms of the agreement. The appellate court adopted the widow's argument that she did not have to make a “claim” against the estate for the home because it was devised to her and therefore vested in her on the

61. *Id.* at 780 (emphasis omitted).

62. *Id.* at 779-81.

63. See *McLain v. Gilliam*, 389 S.W.2d 131, 132 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.); and *Shaw v. Christie*, 160 S.W.2d 989, 991 (Tex. Civ. App.—Beaumont 1942, no writ).

64. For an alternative action available in Texas but not pursued in this case, see Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79 (2003).

65. TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. § 284 (Vernon 2003).

66. TEX. PROP. CODE ANN. § 41.003 (Vernon 2000).

67. *Ferguson v. Ferguson*, 111 S.W.3d 589 (Tex. App.—Fort Worth 2003, pet. denied).

68. *Id.* at 592.

husband's death,⁶⁹ and no conveyance on the part of the executor was required to pass title to her.⁷⁰ It was clear to the court that the language of the decree saying that the widow's waiver of all future interest in the estate meant that she waived anything other than the property she received under the will. The agreement was capable of no other reasonable meaning than that the parties did not intend that the widow give up ownership of the homestead property.⁷¹ But even if she had waived her rights of ownership (which she had not done), she would still have had her right of occupancy.⁷²

II. CHARACTERIZATION OF MARITAL PROPERTY

A. PREMARITAL AND MARITAL PARTITIONS AND EXCHANGES

A father and his ex-wife disputed the means of determining the father's resources for the purpose of providing for their child in *In re Knott*.⁷³ The father asserted that his new wife's income was excluded from consideration in determining his resources for discharging his duty of paternal support. Prior to his remarriage the father and his new wife had entered into a pre-marital agreement by which the income of each spouse would be the recipient's separate property. The child's mother relied on the provision in Section 4.003(b) of the Texas Family Code whereby "[t]he right of a child to support may not be adversely affected by a premarital agreement."⁷⁴ The court construed the provision as a means of discouraging "an obligor from fraudulently characterizing his or her assets so as to diminish or extinguish the amount of the child support obligation."⁷⁵ The principal thrust of this provision from the Uniform Pre-Marital Agreement Act was to preclude an enforceable agreement between future spouses to deprive their children of proper support. The mother argued that the statutory provision was consistent with the constitutional mandate that premarital agreements not be made for any purpose of fraud though there was no evidence that either the husband conspired with his new wife or that she had sought to defraud the mother of child support payments.⁷⁶ The court went on to point out that apart from the agreement Sections 154.062(b) and 156.404(a) exclude the father's wife's community income for inclusion in the father's net resources for computing his child-support obligations.⁷⁷ Thus, the terms of the premarital agreement were beside the point. But the Texarkana court thought that proof of fraud in the formulation of the agreement would have allowed the trial

69. TEX. PROB. CODE ANN. § 37 (Vernon 2003).

70. *Ferguson*, 111 S.W.3d at 595-96.

71. *Id.* at 596.

72. *Id.* at 598.

73. *In re Knott*, 118 S.W.3d 899 (Tex. App.—Texarkana 2003, no pet. h.).

74. TEX. FAM. CODE ANN. § 4.003(b) (Vernon 1998).

75. *Knott*, 118 S.W.3d at 903.

76. *Id.* at 903-05.

77. *Id.* at 904.

court “to deviate from the child-support guidelines.”⁷⁸ The matter was remanded to the trial court for further proceedings.

In 2003 the legislature provided in Section 4.102⁷⁹ that income from property partitioned or exchanged as separate property is separate unless the spouses otherwise provide, as it had already been assumed with respect to gifts by one spouse to the other unless the donor otherwise provides or there is a written agreement of the spouses to the same effect.⁸⁰ After forty years of marriage, the wife sued for divorce; however, after mediation, the couple decided not to divorce but rather to live separately from that time. They then entered into a separation agreement dividing their property. Seven years later the wife brought suit for fraud in the misrepresentation of the extent of community assets on which their agreement was based. The validity of the agreement as a partition or exchange was therefore in issue. The trial court in *Morales v. Morales*⁸¹ held that Section 4.105⁸² does not apply to a *separation* agreement and therefore made no decision as to unconscionability and submitted the issues of fraud to the jury who rendered a verdict that the agreement was unenforceable and awarded damages to the wife for the wrong she had suffered. At the trial, the husband’s counsel was evidently relying on the provisions of Section 4.105(a)(2) in his assertion of the relevance of unconscionability. But the trial court’s order in accordance with the jury’s verdict evidently treated the separation agreement as a nullity on the basis of fraud. The appellate court affirmed that result. In reaching its conclusion, the appellate court should have made it clear that separation agreements may be marital partitions as this one clearly was and that the finding of fraud met the standard of lack of volition provided in Section 4.105(a)(1).

The appellate court further held that because the husband had failed to complain of the trial court’s failure to determine “unconscionability,” he had waived review on that issue. But a finding of unconscionability standing alone would not have made the marital partition unenforceable. Proof of unconscionability must be accompanied with proof of lack of knowledge of the extent of the other spouse’s estate, though it may be inferred that in this case the husband’s fraud would have supported such a finding. The alternative ground for a marital partition’s invalidity is lack of volition under Section 4.105(a)(1) and, in this instance, the husband’s fraud had that effect.

78. *Id.*

79. TEX. FAM. CODE ANN. § 4.102 (Vernon Supp. 2004).

80. See Joseph W. McKnight, *Commentary to the Texas Family Code, Titles*, 21 TEX. TECH L. REV. 911, 1059 (1990); Joseph W. McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY’S L.J. 449, 461-63 (1982).

81. *Morales v. Morales*, 98 S.W.3d 343, 345-48 (Tex. App.—Corpus Christi 2003, pet. denied).

82. TEX. FAM. CODE ANN. § 4.105 (Vernon 1998).

At least two questions arise from this case. First, why would the provisions of Section 4.105(a)(1) not apply to a separation agreement in which the couple's purpose was to alter the character of their community property but not as an incident to divorce? Surely that section is applicable to a transaction that was merely a partition or exchange and did not purport to deal with the disposition of the property in anticipation of a divorce which had not been anticipated seven years before.⁸³ The fact that the spouses decided to separate seems beside the point. Otherwise, the situation does not differ in any significant way from any other marital partition or exchange providing for the parties' partition or exchange of community property. If on the other hand the parties had merely intended to resolve management powers over their community property, no partition would have been intended. If the agreement had been to arrange disposition of the community estate on divorce, their agreement could be interpreted as an agreement incident to divorce under Section 7.006⁸⁴ and not as a marital partition or exchange under Section 4.105.⁸⁵ But neither the trial nor the appellate court's conclusion was said to rest on Section 7.006, though the tone of the appellate court's decision may suggest that it associated the term "unconsciouable" with the phrase "just and right" as used in Section 7.001.

The second question is the applicability of the doctrine of *Schlueter v. Schlueter*⁸⁶ if a suit for divorce ensues at a much later time. In that regard the prior marital fraud would determine the validity of the partition and might affect the division of the community estate as well as the exercise of the court's consideration of the fraud in making the division. If sometime in the distant future after a final judgment is rendered in a situation such as this one the spouses might seek a divorce, the facts of this matter would seem irrelevant to the division of the property apart from the characterization of the property achieved by the partition. Section 4.205 was also legislatively clarified with respect to disputes arising in a decedent's estate concerning a partition or exchange.⁸⁷

B. INCEPTION OF TITLE

*In re Morris*⁸⁸ was a divorce case in which the character of several assets was in dispute. The husband asserted that one tract was an oral gift to him during marriage by his father but that testimony was rebutted by the deed's recital of valuable consideration. The character of the family home was also in dispute. This property was the subject of a 1990 install-

83. The court's opinion does refer to the plaintiff as the husband's "ex-wife," *Morales*, 98 S.W.3d at 345, but there is no other suggestion that a divorce had occurred.

84. TEX. FAM. CODE ANN. § 7.006 (Vernon 1998).

85. See *M'Caskill v. M'Caskill*, 761 S.W.2d 470, 473 (Tex. App.—Corpus Christi 1988, writ denied); *Patino v. Patino*, 687 S.W.2d 794, 801 (Tex. App.—San Antonio 1985, no writ).

86. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

87. TEX. FAM. CODE ANN. § 4.205 (Vernon Supp. 2004).

88. *In re Morris*, 123 S.W.3d 864 (Tex. App.—Texarkana 2003, no pet.).

ment contract between the husband's parents and the husband and wife during the marriage. In 1992 a much larger tract including the property on which the home had been built was conveyed by the parents to the husband as his separate property. The appellate court concluded, however, that the prior contract of sale had already impressed the family home tract with a community character.⁸⁹ A further characterization question involved the value of standing timber grown on the husband's separate property given to him by his parents. The wife conceded that the trees were planted on the land prior to the gift and that during his ownership the husband had contributed no time to care for the timber. Because the court concluded that "the timber crop" had merely increased in value during the marriage, it was properly characterized as his separate property, which the husband had freely conveyed to his parents prior to the divorce.⁹⁰ The court by way of an obiter dictum also expressed the view that even if the husband had expended his energies toward increasing the value of the timber crop, he would have done no more than preserve the quality of his separate estate. But even if the character of the growing crop had not been affected by such efforts, his expenditure of time to make the property productive could provide a grounds for a community right of reimbursement.⁹¹

C. TRACING

In *Proctor v. Proctor*⁹² the husband complained on appeal that the divorce court had awarded his separate property to his wife. The property at issue was the husband's recovery for personal injury. During marriage the husband had received a judgment of about \$1,500,000 for "economic damages" and \$4,000,000 for "non-economic damages" from a California court. As a result of a dispute between the defendants and their insurers as to the liability of each, a settlement was reached between them and the husband and wife (both of whom were parties in the proceedings) by which the described proceeds of the husband's judgments were combined in an unsegregated fund.⁹³ The Corpus Christi appellate court found no clear and convincing evidence in the record of the specific amounts attributable to the husband's separate recovery awarded for personal injury not related to loss of earning power.⁹⁴ Thus, the husband had failed to

89. *Id.* at 871.

90. *Id.* at 869.

91. *Id.* at 871 n.4. What the court says about any claim that might be made for an economic contribution of the community estate to benefit the husband's separate estate under TEX. FAM. CODE ANN. § 3.401-3.410 (Vernon Supp. 2004) seems misplaced in that there was no suggestion of a discharge of a lien on the property that such a contribution-claim entails.

92. *Proctor v. Proctor*, No. 13-00-055-CV, 2001 WL 1558585 (Tex. App.—Corpus Christi Dec. 6, 2001, no pet.) (not designated for publication).

93. *Id.* at *1. The plaintiffs also received cash settlements apart from those described.

94. *Id.* at *3. The court contrasted the holding in *Licata v. Licata*, 11 S.W.3d 269, 274 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) in which such a segregation was accomplished. In *Cottone v. Cottone*, 122 S.W.3d 211, 213 (Tex. App.—Houston [1st Dist.]

rebut the community presumption with respect to the entire award.

D. ACQUISITIONS AFFECTED BY SOVEREIGN AUTHORITY

1. *Income from a Patent*

In *Alsenz v. Alsenz*⁹⁵ the Houston First District Court considered the character of a spouse's "royalty payments" for use of his separate patent (acquired before marriage). The court held that those payments, unlike what are called "mineral royalties," are simply revenues for use and not for consumption of a separate wasting asset despite the patent's limited life-span.⁹⁶ This approach is consistent with that of the federal Fifth Circuit Court of Appeals in dealing with the income from a copyright under Louisiana law.⁹⁷

2. *Effect of ERISA*

In 2001 the Waco Court of Appeals held that the former wife in *Weaver v. Keen*⁹⁸ had waived her rights to two community annuity plans in a property settlement agreement incorporated in a divorce decree. Despite the agreement of the parties, however, the wife's designation as primary beneficiary of the plans was not disturbed. At the former husband's death the contingent beneficiary of the ERISA-controlled⁹⁹ annuities had sued the prior wife for the benefits under the plans. On appeal in *Keen v. Weaver*,¹⁰⁰ the Texas Supreme Court in a five to four decision affirmed the holding of the Waco court in favor of the contingent beneficiary. The Texas "redesignation statute"¹⁰¹ in consequence of divorce vests the benefits of such plans in the alternate beneficiary, as against the prior spouse. Though the United States Supreme Court in *Egelhoff v. Egelhoff*¹⁰² had held that the terms of ERISA preempt that statute,¹⁰³ the federal Fifth Circuit Court of Appeals had held in *Manning v. Hayes*¹⁰⁴ that the actual effect of ERISA must be gleaned not from the terms of the preempting statute but from the caselaw interpreting the statute in order to give ef-

2003, no pet.), a lump sum settlement award also precluded segregation of the separate part of a commingled recovery.

95. *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

96. *Id.* at 654.

97. *Rodrigue v. Rodrigue*, 218 F.3d 432, 441 (5th Cir. 2000), *cert. denied*, 532 U.S. 905 (2003) (finding "economic benefits derived from copyrights" as community property).

98. *Weaver v. Keen*, 43 S.W.3d 537, 544 (Tex. App.—Waco 2001), *aff'd*, 121 S.W.3d 721 (Tex. 2003), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 54 SMU L. REV. 1383, 1412 (2001).

99. See Employee Retirement Security Act of 1974 (ERISA) as amended, 29 U.S.C. § 1002(2)(A) (2000).

100. *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003).

101. TEX. FAM. CODE ANN. § 9.302(a) (Vernon 1998).

102. 532 U.S. 141, 143 (2001), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1036, 1067 (2002).

103. 29 U.S.C. § 1144(a).

104. *Manning v. Hayes*, 212 F.3d. 866, 870-74 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

fect to the former wife's waiver of her rights under the plan.¹⁰⁵ The court therefore concluded that the former wife's argument that her interest was protected by the anti-alienation provisions of ERISA¹⁰⁶ failed because that provision "[did] not apply to a beneficiary's waiver."¹⁰⁷ To the extent that the Houston Fourteenth District Court of Appeal's decision in *Heggy v. American Trading Employee Retirement Account Plan*¹⁰⁸ reached a contrary conclusion, that holding was disapproved. The four dissenting judges nevertheless concluded that because the particular plans made no provision for a beneficiary's waiver of benefits, the provision of ERISA as to a designated beneficiary¹⁰⁹ should nevertheless prevail.¹¹⁰ The dissenting judges further pointed out that the reliance of the majority of the court on the caselaw interpretation of ERISA is properly allowed only if "ERISA has nothing to say" on a point.¹¹¹ But in this instance ERISA does have something to say on the matter in general, if not specific, terms. Hence, the majority's reliance on pre-*Egelhoff* decisions of some federal circuit courts was said to be misplaced.¹¹² Thus the dissenters concluded that the plan administrator should not be forced to resolve such an ambiguous situation as the annuitant's intention in leaving the primary-beneficiary designation undisturbed after divorce.¹¹³ This easy solution of ERISA preemption would therefore allow the plan-administrator to follow the specific designation of the primary beneficiary.

In *Heggy II* the Houston Fourteenth District Court responded to the Texas Supreme Court's decision in *Keen* by acknowledging that its holding in *Heggy I* in favor of the divorced wife of the deceased plan-member against her surviving spouse had been disapproved.¹¹⁴ The Fourteenth District court also dealt with attorney's fees to which the plan administrator was entitled and the lack of liability of the plan for benefits already paid to the first wife.

E. REIMBURSEMENT RIGHTS

In *In re Royal*¹¹⁵ proof of gifts to each spouse was at issue. The divorce-

105. See *Keen*, 121 S.W.3d at 723-27.

106. 29 U.S.C. § 1056(d)(1).

107. *Keen*, 121 S.W.3d at 727 (citing *Estate of Altobelli v. Int'l Bus. Mach. Corp.*, 77 F.3d 78, 81 (4th Cir. 1996); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir. 1990) (en banc), cert. denied, 498 U.S. 820 (1990)).

108. *Heggy v. Am. Trading Employee Ret. Account Plan*, 56 S.W.3d 280, 283-85 (Tex. App.—Houston [14th Dist.] 2001, no pet.), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659, 1670 (2003). In light of the Texas Supreme Court's decision, a second review of the case was made in *Heggy v. Am. Trading Employer Ret. Plan [Heggy II]*, 123 S.W.3d 770 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

109. 29 U.S.C. § 1002(8).

110. *Keen*, 121 S.W.3d at 729.

111. *Egelhoff*, 532 U.S. at 148.

112. *Keen*, 121 S.W.3d at 731.

113. *Keen*, 121 S.W. 3d at 733.

114. *Heggy II v. Am. Trading Employee Ret. Account Plan [Heggy II]*, 123 S.W.3d 770, 775 n.1 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

115. *In re Royal*, 107 S.W.3d 846 (Tex. App.—Amarillo 2003, no pet.).

ing couple married in 1994 and purchased a house in 1996. In making the purchase, the couple had sought the financial assistance of the husband's grandparents who provided \$60,000 toward the purchase price for which the couple gave the grandparents a note secured by a deed of trust on the house. The couple renewed the note in 2001. The renewal note for \$20,000 recited that \$40,000 of the loan had been forgiven. At the trial, the grandfather testified that in 2000 and 2001 he and his wife had made a gift to each spouse of \$10,000 so as to qualify as gift tax-exemptions for the donors (as the grandfather's attorney had advised him in writing in 2000). Thus, for the donors, a gift to each spouse was shown. The trial court, however, found that the house was community property and that the debt waiver amounted to a benefit for the couple's community estate.¹¹⁶ The Amarillo Court of Appeals held that each spouse was entitled to an economic-contribution reimbursement of \$20,000 from the community estate on the ground that a gift to each spouse as separate property was shown but held that the gifts to both parties were made in 2001 when the renewal note was given.¹¹⁷

As to an additional \$12,850 of his separate property that the husband paid the seller as part of the purchase price, the Amarillo court held that he had contributed his separate property to enhance the community estate, and it was not a gift to his wife of half that amount when paid at the closing when the house was titled in the names of both spouses.¹¹⁸ The court relied on its decision in *In re Thurmond*¹¹⁹ to rebut the husband's presumed gift to his wife of one-half of the amount contributed at the closing of the transaction. The court's conclusion seemed to stem from the fact that both spouses joined in making the purchase contract. But if the husband alone had bought property with his separate estate and had taken title in his wife's name, or in the name of both spouses, there is a presumption that the property bought would be the wife's acquisition of separate property of all or one-half, respectively.¹²⁰

In another respect, the husband asserted that he was divested of a separate property interest by the trial court's determination that expenses of the ultimate sale of the house should be deducted before the final division of the community sales price between the spouses. His argument was that he had acquired a lien for his economic contribution to the community property which should be discharged prior to the division. As its reason for rejecting this argument the court merely stated that the husband had cited no authority to support his argument.¹²¹ It may be responded that Section 3.403¹²² itself supplies the needed authority. The court said that the husband was "[w]ithout a separate property interest

116. *Id.* at 849.

117. *Id.* at 852-53.

118. *Id.* at 851-52.

119. *In re Thurmond*, 888 S.W.2d 269, 273 (Tex. App.—Amarillo 1994, writ denied).

120. *Smith v. Strahan*, 16 Tex. 314, 323 (Tex. 1856).

121. *Royal*, 107 S.W.3d at 853.

122. TEX. FAM. CODE ANN. § 3.403 (Vernon Supp. 2004).

arising from [his] claim for economic contribution.”¹²³ Apparently the husband’s claim had meant that the expenses of the community sale should be paid before the community division was made and should not detract from his separate property lien.

In *Zeptner v. Zeptner*¹²⁴ the husband had used community funds to improve his separate house. But there was no evidence of the property’s value before improvement and the present value of the property was less than the amount of reimbursement found by the trial court. Hence, the right of reimbursement wholly failed.¹²⁵ The burden of proof is generally said to be on the claimant for reimbursement to show enhancement in value of the property improved (not merely the amount expended). In this sort of case, the burden of proof seems more justly placed on the husband because he applied community property under his control for the benefit of his separate property. Thus it would be appropriate to shift the burden to the controlling spouse to show the amount expended (and sometimes the value of the property) once a prima facie case has been made that community property was expended on the separate estate.

*Dessommes v. Dessommes*¹²⁶ presented a similar problem. The dispute there concerned an undivided community interest in the husband’s retirement benefits to which his employer had added significant, but uncertain, contributions following divorce. Such post-divorce contributions were therefore attributable to the husband’s separate estate. The ex-wife sought a partition of the undivided community portion of the benefits. The Dallas appellate court, speaking through Chief Justice Guittard, wisely put the burden of proof on the husband, who had access to all of the relevant facts, to show how much separate property had been added to the fund after the divorce.¹²⁷ Similarly if during marriage a spouse has control of community property that has been used to benefit that spouse’s separate property, justice would be served by requiring that spouse to bear the burden of showing how much of the community property was so used. This point, as to burden of proof, is further illustrated by *In re Morris*¹²⁸ in which there was a dispute as to community reimbursement for improvements to the husband’s separate property evidently made by the husband.

In *Zeptner* the record with respect to the reimbursement claims of each spouse was very sparse. Little evidence was developed to support the claims made by each. The husband made a claim for an uncertain amount supplied to his wife to discharge a pre-marital lien on her separate prop-

123. *Royal*, 107 S.W.3d at 853.

124. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.—Fort Worth, 2003, no pet.).

125. *Id.* at 740.

126. *Dessommes v. Dessommes*, 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, writ ref’d, n.r.e.).

127. *Id.* at 680.

128. *In re Morris*, 123 S.W.3d 864, 871 (Tex. App.—Texarkana 2003, no pet.) (citing that court’s decision in *In re Marriage of Morris*, 12 S.W.3d 877, 882 (Tex. App.—Texarkana 2000, no pet.) (involving different parties)); see Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1016 (2000).

erty. Although the appellate court suggested that the husband's writing a check to his wife for this alleged purpose might have been a gift, there was no evidence in the record that the husband did or did not have that intent. Although Texas law presumes a gift to his wife when the husband deposits a community check to his wife's bank account with instructions that the deposit is to be within her sole control,¹²⁹ or when the husband transfers community property to her,¹³⁰ the husband's writing a check to his wife for the specific purpose of discharging her separate debt can be differently interpreted though the scales of doctrine would seem slightly tipped toward following the presumption of gift in the absence of proof of a contrary intention. In presenting such evidence, the provider's testimony, of course, may be dismissed by the finder of fact as merely self-serving.¹³¹

In discussing the husband's burden of proof to establish the community right of reimbursement in *Zeptner*, the court stated that he had failed "to establish the offsetting benefits to the community estate."¹³² The court cited *Vallone v. Vallone*,¹³³ *Zieba v. Martin*,¹³⁴ and *Gutierrez v. Gutierrez*¹³⁵ in support of the proposition that it is the reimbursement-claimant's burden to prove "the net benefit to the payee estate."¹³⁶ This conclusion is stating the burden of the claimant somewhat too broadly. The authorities certainly put the burden on the claimant to show the benefit rendered by the contributing estate and to rebut as much as he can of any off-setting benefit that the claiming estate may have enjoyed, but to say that he must assert and prove any conceivable offsetting benefit which the contributing estate may have enjoyed seems putting the level of his burden too high.

The wife also made a reimbursement claim on behalf of the community estate, and the trial court indeed found that the husband had applied \$25,000 of community property to improve his separate property.¹³⁷ The husband showed that the property was appraised at \$23,500 for the purpose of fixing ad valorem taxes at the beginning of 1999 and again in 2000, but there was no evidence of the values of the property prior to the alleged "capital improvements."¹³⁸ The appellate court held that the trial judge's finding of a right of reimbursement when the property had received no apparent benefit resulting from the alleged investment of the

129. *Sorenson v. City Nat'l Bank*, 121 Tex. 478, 49 S.W.2d 718 (1932).

130. *Story v. Marshall*, 24 Tex. 305 (1859).

131. *Hampshire v. Hampshire*, 485 S.W.2d 314 (Tex. Civ. App.—Fort Worth 1972, no writ); *Patterson v. Metzing*, 424 S.W.2d 255 (Tex. Civ. App.—Corpus Christi 1967, no writ).

132. *Zeptner v. Zeptner*, 111 S.W.3d 727, 736 (Tex. App.—Fort Worth 2003, no pet.).

133. *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982).

134. *Zieba v. Martin*, 928 S.W.2d 782, 788 (Tex. App.—Houston [14th Dist.] 1996, no writ).

135. *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 665 (Tex. App.—San Antonio 1990, no writ).

136. *Zeptner*, 111 S.W.3d at 735.

137. *Id.* at 737-38.

138. *Id.*

property constituted an abuse of discretion.¹³⁹ This conclusion, of course, follows the statement of the Texas Supreme Court in *Anderson v. Gilliland*¹⁴⁰ that the benefiting estate is entitled to reimbursement in an amount neither more nor less than the amount of the benefit. That was a case, however, in which a benefit had been *gained* by the property. But the court did not discuss the right of the contributing estate when there was no permanent net benefit rendered. Thus, no right of reimbursement is claimable in such a case under the rule in *Anderson*. There must surely be instances of no net gain in the worth of the property on which the expenditure was made when the expense seemed justified at the time or provided a significant benefit when rendered but deteriorated over time. Significant but wasting capital repairs illustrate this point. The rights to, and measure of, reimbursement is therefore in need of further analysis in this instance.

In *Alsenz v. Alsenz*¹⁴¹ the court considered a variety of claims for reimbursement. One of these was the wife's assertion of a community claim against the husband for losses incurred through the husband's handling of his day-trading account. The amount of the alleged loss was uncertain, but on ascertaining all the facts, this sort of claim should be considered by a trial court as an appropriate basis for reimbursement both historically¹⁴² and precedentially.¹⁴³ A showing of benefit to a marital estate is not necessary for such types of reimbursement for wasting or wanton use of the community estate.

In *Alsenz*¹⁴⁴ the appellate court also considered the husband's complaint that the trial court had treated his uncertain but allegedly significant expenses for repair and maintenance of his separate car as reimbursable to the community estate. In the absence of evidence of the

139. *Id.* at 738.

140. *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985).

141. *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

142. See JUAN MATIENZO, COMMENTARIA IN LIBRUM QUINTUM RECOLLECTIONIS LEGUM HISPANIAE, bk. 5, tit. 9, law 5, gloss 6.11-12 at 2666-2676 (1580); ALFONSO AZEVEDO, COMMENTARIUM IURIS CIVILIS IN HISPANIAE REGIAS CONSTITUTIONES, bk. 5, tit. 9, law 5, gloss 8 at 304-305 (1612) (where he reconciles seemingly conflicting authorities); JUAN GUTIERREZ, PRACTICARUM QUESTIONUM CIRCA LEGES REGIAS HISPANIAE, Q. 121 at 325-327 (1730); *Horlock v. Horlock*, 533 S.W. 2d 52, 55-56 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed w.o.j.) (Under the reasonableness-of-disposition test, no reimbursement was awarded for the wife's claim for community reimbursement for the husband's gratuitous transfer of community property to his children of a prior marriage).

143. See *Carnes v. Meador*, 533 S.W.2d 365, 370-71 (Tex. Civ. App.—Dallas 1975, writ refused n.r.e.) (deceased husband's intervivos transfer of community funds to his daughter was a proper claim by the wife for reimbursement); *Reaney v. Reaney*, 505 S.W.2d 338, 340 (Tex. Civ. App.—Dallas 1974, no writ) (husband's squandering of community funds on a pleasure trip to Puerto Rico); *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421, 423 (Tex. Civ. App.—Dallas 1972, writ refused n.r.e.) (husband's designation of a female friend as beneficiary of a community life insurance policy); *Horlock*, 533 S.W.2d at 55-56; *Murphy v. Metro. Life Ins. Co.*, 498 S.W.2d 278, 282 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ refused, n.r.e.) (husband's naming his elderly mother as beneficiary of a community life insurance policy instead of his wife and children who were also in need of support).

144. *Alsenz*, 101 S.W.3d at 656-57.

expenditures (though the amount admitted by the husband was \$4,000), the appellate court found that the trial court improperly granted the community property reimbursement.¹⁴⁵ The court remarked¹⁴⁶ however, that mere repair and maintenance of separate property (as opposed to enhancement in value) at community expense is allowed under the rule in *Anderson v. Gilliland*.¹⁴⁷ But can "repair" or restoration of an antique car (such as that in *Alsenz*) be regarded as falling in that category? The separate property in issue was a 1988 BMW automobile referred to by the husband somewhat self-servingly as the "family car." But if the object of repair had been a seventeenth-century painting, the court's outlook should have been somewhat different even if the artifact had merely served as family wall decoration. In its discussion, the court also somewhat misstated the holding in *Norris v. Vaughan*¹⁴⁸ that "there is no right to reimbursement for costs of living."¹⁴⁹ The *Norris* court merely denied reimbursement of the *separate* estate for familial support, a view now somewhat discredited.¹⁵⁰ No one has ever suggested that the community estate should be reimbursed for ordinary family support, and it was *community* reimbursement which was at issue in *Alsenz*. The question was whether community funds had been properly expended on the husband's separate property for a non-family purpose, as the trial court should have been able to judge.

In *Alsenz* the husband had contended that his wife had "committed fraud on the community" by failing to include in her inventory certain claims due her by a corporation controlled by the husband.¹⁵¹ This is a somewhat distorted use of the term "fraud on the community" if that phrase is to have any precise meaning. The appellate court concluded that the claim was an asset that should be considered by the trial court but also one of which the husband and the corporation had full prior notice.¹⁵² If ever a claim was within the rule in *Schlueter v. Schlueter*,¹⁵³ this one clearly was. Thus the assertion was rejected by the court with the very gentle comment that the "record . . . [did] not fully support the contention of fraud."¹⁵⁴

If a reimbursement claim is to make the community whole on divorce, there are some different considerations that may apply in a variety of

145. *Id.* at 657.

146. *Id.* at 656.

147. *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985).

148. 152 Tex. 491, 503, 260 S.W.2d 676, 683 (1953).

149. *Alsenz*, 101 S.W.3d at 656.

150. The authority of *Norris v. Vaughan* is also circumvented or ignored. See, e.g., *Brooks v. Brooks*, 612 S.W.2d 233, 236-37 (Tex. Civ. App.—Waco 1981, no writ), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 36 Sw. L.J. 97, 146 (1982) and *Hilton v. Hilton*, 678 S.W.2d 645 (Tex. App.—Houston [14th Dist.] 1984, no writ), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 39 Sw. L.J. 1, 9-10 (1985).

151. *Alsenz*, 101 S.W.3d at 657.

152. *Id.*

153. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

154. *Alsenz*, 101 S.W.3d at 657.

instances. In the generality of cases of (1) spousal gifts of community property, (2) alienation of property not subject to the sole management of the spouse who disposes of it, or (3) a spouse's waste or use of community property for selfish enjoyment, the right of reimbursement may be handled differently from the way the same sort of transfer is dealt with in the settlement of a decedent's estate. The difference stems from the fact that equitable division is relevant to division of community property in divorce, whereas at death the spouses' community interest must be divided equally. In a death case, the weighing of equities is nevertheless still applicable in fixing the extent of a claim to be recovered.

At its 2003 regular session the Texas Legislature once again defined aspects of the law of reimbursement by clarifying the arithmetic formula for computing the value of an economic contribution of one marital estate for the benefit of secured interest in another marital estate.¹⁵⁵

F. RECOVERY FOR SPOUSAL DESTRUCTION OF AN INSURED INTEREST IN COMMUNITY PROPERTY

In *Texas Farmers Insurance Co. v. Murphy*¹⁵⁶ the Texas Supreme Court held that a wife as an innocent spouse might recover for her one-half share of the proceeds of a community insurance policy for loss resulting from her husband's intentional destruction of their insured mobile home.¹⁵⁷ Although the insurer had pled a concealment clause of the policy—if any insured fraudulently concealed facts relating to the loss,¹⁵⁸ the recovery on the policy was barred—the insurer nonetheless had failed to prove fraudulent concealment at the trial.¹⁵⁹ The innocent divorced wife, whose community share of the policy was partitioned to her at divorce, was allowed to recover that share against the insurer. But the court did not put its reliance on the innocence of the claim made by the wife-coinsured. Rather the court allowed her recovery based on the contract.¹⁶⁰

Similar facts were before the Amarillo Court of Appeals in *M^cEwin v. Allstate Texas Lloyds*,¹⁶¹ but there the trial court granted the insurer summary judgment. The concealment clause in the policy of insurance was relied on by the insurer, and the appellate court was satisfied that the insurer had not waived that provision under Insurance Code 21.19¹⁶² by making some payments under the contract. The insurer had made a payments of \$1,000 to the insureds on the lost contents of the home, \$10,000

155. TEX. FAM. CODE ANN. § 3.403 (Vernon Supp. 2004).

156. *Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 880 (Tex. 1999), noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 53 SMU L. REV. 995, 1013-14 (2000).

157. In all of the seven previous Texas appellate cases of this type the property destroyed was also a mobile home. This is the first case of the series involving an ordinary house.

158. *Murphy*, 996 S.W.2d at 880.

159. *Id.*

160. *Id.* at 880-81.

161. *M^cEwin v. Allstate Tex. Lloyds*, 118 S.W.3d 811, 817 (Tex. App.—Amarillo 2003, no pet.).

162. TEX. INS. CODE ANN. § 21.19 (Vernon 1981).

for additional living expenses, and nearly \$38,000 to the lien holder on the house. The court apparently relied on the insureds' waiver of that defense. But the court did not explain how the insurer's summary judgment proof satisfied the terms of the concealment clause beyond its reliance on the wife's "contention" and the ex-husband's acts indicated in the summary judgment proof. The "contention" presumably referred to the husband's subsequent claim which concealed the charge of arson for which he had been convicted. This assertion was presumably a part of the wife's pleading in her independent cause of action for a reimbursement claim¹⁶³ against her ex-husband, which was severed for a separate trial.

It should be noted that because the innocent spouse was entitled to recover under *Murphy* in the absence of the insurer's reliance on a violation of the concealment clause in the insurance policy, the guilty spouse should be advised against making any claim. But if the insurance policy excludes any claim for a loss in which the guilty insured was involved, the claim of the innocent spouse must still fail. Other sorts of claims, such as those for a spouse's personal injury,¹⁶⁴ may nevertheless be within the scope of the decision in *Murphy* making the imputed-fault defense unavailable against an innocent spouse's claim for a share of a tortious community loss.

III. MANAGEMENT AND LIABILITY OF MARITAL PROPERTY

A. MANAGEMENT OF MARITAL PROPERTY

In what otherwise appeared to be a rather routine divorce proceeding, the husband's mother intervened to assert a claim to the couple's home acquired with the assistance of the husband's late father. The mother in *Jean v. Tyson-Jean*¹⁶⁵ asserted (with some apparent support from her son) that her husband, acting alone, had made a gift to his son and future daughter-in-law of community property subject to the joint management of the father and mother. There was a very significant disparity in the evidence presented at the trial but the judge concluded that the father was the sole manager of the community funds with which he was dealing.¹⁶⁶ The mother appealed.

In 1989, prior to their marriage, the divorcing couple evidently lacked the necessary credit to buy a house. The husband's father initially took title to the house from the seller. The mother was present at the closing but took no part in the transaction. The father alone procured the loan for the purchase, and the couple moved into the house where they lived until their separation in 2000. After the couple's marriage, the father

163. This was presumably a suit for reimbursement for the wife's community losses. See McKnight, *supra* note 128, at 1014 n.142 and accompanying text.

164. See *Graham v. Franco*, 488 S.W.2d 390, 397 (Tex. 1972).

165. *Jean v. Tyson-Jean*, 118 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

166. *Id.* at 4.

conveyed the property to them and then died six months later. Though the mother insisted that the funds for the father's purchase had come from the parents' community savings account and that those funds had never been repaid, the trial judge had evidently concluded on the basis of other evidence that the father had the sole control of funds and that the couple did not have any notice of his lack of sole authority. In her appeal the mother contended that the property was jointly managed community property and that her joinder was necessary to the validity of the purchase and conveyance. The appellate court nevertheless concluded that the husband and wife had *dealt with* the father without notice that he did not have sole management of the property under Section 3.104.¹⁶⁷ Thus the Houston Fourteenth District appellate court treated the couple not as donees but as the undisclosed purchasers of the house dealing with the father in good faith within the terms of Section 3.102.¹⁶⁸ There was evidence that some of the purchase money was furnished by the couple and that they had repaid the father for the loan of funds he used in handling the purchase for them.¹⁶⁹ There was also a suggestion that the father was merely acting as the couple's agent in making the purchase. In the absence of any clear findings of fact by the trial judge, the appellate court rested its judgment on the conclusion that the couple had established reliance on the Section 3.104(b) "presumption" of the father's sole management of the community purchase money.¹⁷⁰ The burden of proof therefore shifted to the mother to show that the couple had joined with the father to defraud her or that they had notice of his lack of authority to deal solely with the funds.¹⁷¹ Despite a "suggestion" in the evidence that the couple had knowledge of the father's lack of sole-management power, the court nonetheless went on to conclude couple had not proved "no notice" or "no fraud."¹⁷² The court further held that the couple was not as a matter of law fixed with notice by knowing that they were dealing with a married man.¹⁷³

The court then discussed what it called "[a] presumption of constructive fraud [which] arises when a spouse unfairly disposes of the other spouse's interest in community property."¹⁷⁴ The court, however, found abundant evidence in the record to rebut this "presumption" on the basis of which the court concluded that the father had acted within his authority to deal with the community property used to purchase the house.¹⁷⁵

167. *Id.* at 5-6 (citing TEX. FAM. CODE ANN. § 3.104 (Vernon 1998)).

168. *See* TEX. FAM. CODE ANN. § 3.102 (Vernon 1998).

169. *Jean*, 118 F.3d at 3.

170. *Id.* at 10.

171. *Id.* at 6-7.

172. *Id.* at 7.

173. *Id.*

174. *Id.* at 9.

175. *Id.* at 10.

B. PROTECTION OF THE FAMILY HOME FROM CREDITORS' CLAIMS

1. *Definition of the Rural Homestead*

In two cases the federal Fifth Circuit Court of Appeals clarified the definition of a rural homestead. In *In re Perry* the bankruptcy court had held that Property Code Section 41.002(c)(2)¹⁷⁶ enacted in 1999 supplied a legislative redefinition of the rural homestead within corporate limits of a town when it lacks certain urban utility services. The bankrupts' creditors argued that the bankrupts had lost their homestead by conveying the property to a corporation in exchange for corporate stock and that the corporation had become defunct without reconveying the property to the bankrupts. The court held that the bankrupts had nevertheless maintained a limited homestead interest in the property based in their tenancy-at-will relationship to the corporation. But if the creditors could achieve control of the corporation, they might remove the bankrupts from the property.¹⁷⁷

A similar conclusion was reached by a bankruptcy court in *In re Sorrell*.¹⁷⁸ There the husband and wife lived in a house purchased for them by the wife's brother with an agreement that he would convey title to them when they paid the purchase price. In their bankruptcy proceeding, the couple asserted their homestead rights to the property and resisted a creditor's lien for repairs on the property because their agreement for the work had not been recorded prior to its commencement.¹⁷⁹ Though the bankrupts did not have a fee simple title to the realty, their homestead claim was nevertheless confirmed.¹⁸⁰

*In re Bouchie*¹⁸¹ involved a homestead claim to eighty-five acres of otherwise rural land within municipal boundaries where the debtors made their home. The Fifth Circuit court held that the provisions of Section 41.002(c) had superceded its analysis in *In re Blakeman*¹⁸² and that the use of rural homestead property for a profit-making purpose (a mobile home park) does not cause it to lose its rural homestead character as suggested in *In re Bradley*.¹⁸³

2. *Foreign Homestead Claims*

In *In re Brown*¹⁸⁴ the bankrupt residents of a federal military base in Texas claimed a timeshare interest in Florida realty as a homestead ex-

176. TEX. PROP. CODE ANN. § 41.002 (c)(2) (Vernon 2000).

177. *In re Perry*, 267 B.R. 759 (Bankr. W.D. Tex. 2001), discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1053-54 (2002). See also Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659, 1680-81 (2003).

178. *In re Sorrell*, 292 B.R. 276 (Bankr. E.D. Tex. 2002).

179. TEX. PROP. CODE ANN. § 53.059 (Vernon 2002) (repealed Sept. 1, 1997).

180. *Sorrell*, 292 B.R. at 289.

181. *In re Bouchie*, 324 F.3d 780 (5th Cir. 2003).

182. *In re Blakeman*, 997 F.2d 1084 (5th Cir. 1999).

183. *In re Bradley*, 960 F.2d 502, 506 n. 6 (5th Cir. 1992).

184. *In re Brown*, 299 B.R. 425 (Bankr. E.D. Tex. 2003).

emption in their Texas bankruptcy. The court held that the homestead claim is fixed by its situs and, thus, if the property is not entitled to a homestead exemption under Florida law, it is not exempt in a Texas bankruptcy proceeding.¹⁸⁵ In this case it was not shown that the bankrupts used the property as their residence but enjoyed merely limited occupancy.¹⁸⁶ Texas law does not purport to define homesteads otherwise than within Texas.

3. *Home Equity Loans*

In *Vincent v. Bank of America*¹⁸⁷ the mortgagors sought to bring a class action against their mortgagees. The trial judge granted summary judgment to the defendant on the mortgagors' appeal. In the summer of 2003 the Dallas Court of Appeals denied forfeiture of the principal and interest for the mortgagees' breaches of obligations in making the home-equity loans,¹⁸⁸ denied injunctive relief against them for using certain accounting methods,¹⁸⁹ and granted the mortgagors some relief from those accounting practices,¹⁹⁰ but the court denied their right to a class action certification.¹⁹¹

In response to the *Vincent* case and other creditor's complaints, a further amendment to Article XVI, Section 50 of the Texas Constitution¹⁹² was adopted in September of 2003 to allow home-equity lines of credit and borrowing to refinance home equity loan by using "reverse mortgages,"¹⁹³ as well as provisions allowing lenders to cure violations of the lending law¹⁹⁴ and giving power to the Personal Finance Commission and Credit Union Commissions to interpret the provisions of the constitutional article.¹⁹⁵

In *Alcorn v. Washington Mutual Bank*¹⁹⁶ (decided prior to the approval of these amendments), borrowers who had received a home equity loan from a lender sued the note holder for money allegedly owed to them, and the defendant-bank filed a cross action for amounts owed on the loan and to foreclose its security. The trial court granted summary judgment to the bank, and the borrowers appealed. It was the contention of the borrowers that the transaction somehow did not constitute a loan to them but instead "created" money for their account for their benefit. Thus they asserted that the note holder owed a debt to them. In rejecting what it termed a "patently unmeritorious legal theory . . . based on . . . [their]

185. *Id.* at 428.

186. *Id.*

187. *Vincent v. Bank of Am.*, 109 S.W.3d 856 (Tex. App.—Dallas 2003, pet. denied).

188. *Id.* at 861-63.

189. *Id.* at 863.

190. *Id.* at 866-67.

191. *Id.* at 864-65.

192. TEX. CONST. art. XVI, § 50(a)(6)(F), (t).

193. *Id.* at § 50(f).

194. *Id.* § 50(a)(6)(Q)(x).

195. *Id.* § 50(u).

196. *Alcorn v. Wash. Mut. Bank*, 111 S.W.3d 264 (Tex. App.—Texarkana 2003, no pet.).

misinterpretation of some information they discovered in a publication issued by the Federal Reserve System,"¹⁹⁷ the appellate court went on to explain the process of borrowing on a promissory note secured by the equity in a borrowers' home and affirmed the judgment of the lower court granting relief in the countersuit but exonerating the debtors for personal liability¹⁹⁸ as provided in the Constitution. The court however declined to assess damages against the borrowers for a frivolous appeal.¹⁹⁹

4. *Personal Property Exemptions*

The bankrupt in *In re Young*²⁰⁰ asserted his right to an interest in a discretionary trust under his father's will²⁰¹ as exempt under Texas law,²⁰² but his claim exceeded the amount that might be claimed. The court then considered whether the excess might be claimed as being beyond the bankruptcy estate.²⁰³ He failed on this ground either because he held a presently vested interest in the trust presumed to be property of the bankruptcy estate or because he took an interest in his father's estate on intestacy because the will had not been probated.²⁰⁴ Even if in intestacy a trust might be established on the basis of the alleged testamentary instruments,²⁰⁵ there was no evidence of a spendthrift provision with regard to the interest.

In *In re Chaparro Martínez*²⁰⁶ the debtor asserted as exempt property "one-hundred percent" of the estimated value of an unadjudicated personal injury claim for \$10,000. No timely objection to the debtor's claim was asserted, and the claim was thereafter settled for \$23,000. The trustee objected that no more than \$10,000 should be distributed to the debtor. The bankruptcy court held that if the monetary value of the claim had been asserted rather than the amount of the estimated value of the total claim, the debtor's claim would be so limited,²⁰⁷ but the proceeds of the claim as asserted were not a part of the bankruptcy estate.²⁰⁸ Thus the debtor could pay his attorney's fees out of this non-estate property as he saw fit²⁰⁹ without regard to the Bankruptcy Code's "rigorous provisions regulating attorney's fees."²¹⁰

197. *Id.* at 266.

198. *Id.* at 267-68.

199. *Id.* at 268.

200. *In re Young*, 297 B.R. 492 (Bankr. E.D. Tex. 2003).

201. 11 U.S.C. § 522(d).

202. TEX. PROP. CODE ANN. § 42.002 (Vernon 2002).

203. 11 U.S.C. § 541(c)(2).

204. *Id.* at 496-500.

205. TEX. PROP. CODE ANN. § 112.007 (Vernon 2002).

206. *In re Chaparro Martínez*, 293 B.R. 387 (Bankr. N.D. Tex. 2003).

207. *Id.* at 389 (citing *In re Soost*, 262 B.R. 68, 73-74 (8th Cir. BAP 2001)).

208. *Id.* at 390.

209. *Id.* at 391.

210. *Id.*

IV. DISPOSITION OF MARITAL PROPERTY ON DIVORCE

A. PROCESS OF DIVORCE

1. *Statutory Changes*

While the Texas Supreme Court sought to correct perceived improprieties in the practice of paying and receiving referral fees,²¹¹ the Texas Legislature at its regular session of 2003 amended a number of statutes affecting both the practice and substance of Texas family law. Two provisions with very different language were enacted as Section 6.410 of the Family Code. The text relevant here²¹² provides that all pleadings and other writing in a divorce suit are confidential except to parties until the date of service of citation or after the thirty-first day after filing of suit of divorce, but this provision is not applicable statewide. It is only “to regulate solicitation of business by family law attorneys in Harris County [the only county in which it is effective] . . . particularly when there may be a threat of violence or the potential for the destruction of assets before service of any type of restraining order could be served.”²¹³

The repeal of Section 6.404 (Statement of Alternative Dispute Resolution)²¹⁴ was prompted by a recommendation of the Council of the Family Law Section. This provision “designed to ensure that the parties to a lawsuit were informed about the existence and utility “ of the means of alternative dispute resolution, had had unintended consequences . . . to the detriment of individual litigants because of the time and effort required for compliance with the provision that had to be signed by the party in filing the first pleading.” The utility of alternative dispute resolution of family disputes has become so well known that this provision is superfluous.²¹⁵

2. *Compulsory Joinder of Suit Affecting the Parent-Child Relationship with a Suit for Divorce*

In the context of an appeal from a decree of divorce, the Corpus Christi Court of Appeals held in *Diaz v. Diaz*²¹⁶ that a suit for divorce is fatally defective without joinder of a suit affecting the parent-child relationship when the parties have had a minor child. Failure to meet this

211. See *Proposed Rule 8a of the Texas Rules of Civil Procedure*, 67 TEX. B.J. 116 (2004).

212. The other section numbered 6.410 deals with a report in compliance with the Health and Safety Code.

213. TEX. FAM. CODE ANN. § 6.404 (Vernon Supp. 2004), on H.B. 2886, effective Sept. 1, 2003. See *Comment* by John J. Sampson, 2003-2 STATE BAR [OF TEXAS] SECTION REPORT FAMILY LAW 14.

214. TEX. FAM. CODE ANN. § 6.404 (Vernon Supp. 2004). Thus a principal objective of Section 3.54, requiring pre-divorce counseling as enacted in 1969 and amended in 1973, 1975, and 1997 (as Sections 6.505, 6.705, and 6.707), has been achieved.

215. See Sampson, *op. cit.* note 213, *Comment* on H.B. 2886, effective Sept. 1, 2003, at 14.

216. *Diaz v. Diaz*, 126 S.W.3d 705 (Tex. App.—Corpus Christi 2004, no pet.).

fundamental element in the 1969 plan of the Texas Family Code²¹⁷ is not often encountered in practice but this landmark in Texas procedure is worthy of remembrance.

3. Waiver of Service

In a direct attack on a divorce decree by limited appeal after the wife's filing for divorce in *Campsey v. Campsey*²¹⁸ the husband at her request signed a waiver of service of process, made his appearance, and agreed that the case could proceed without any further notice to him. At the hearing for a temporary restraining order, at which the husband appeared, he then executed a printed waiver of service and entry of an appearance in which it was provided that he would be given notice of the date of the trial, and both parties were ordered to appear at a fixed time about two weeks later. That same day the wife filed her husband's previously executed waiver of service. The husband did not file an answer to the petition nor did he appear at the hearing as ordered and was not given any further notice. The decree of divorce was entered two months following the husband's initial execution of the waiver of service. The husband attacked the decree by a limited appeal.²¹⁹ The husband had met some of the requirements of the Rules of Appellate Procedure²²⁰ including the timely filing of his appeal, but there was a dispute as to his compliance with the requirement of his participation in the trial proceeding in addition to the requirement that the court's error must be apparent on the face of the record to entitle the petitioner to a bill of review. In construing the husband's failure to participate in the trial, the court followed the rule liberally in favor of the right to appeal²²¹ and concluded that the husband's acts did not constitute participation in the proceedings. But the husband's failure to show error on the face of the record was fatal to an adjudication in his favor.²²²

4. Prisoners' Rights

In *In re Buster*²²³ a prisoner at some distance from the court sought a divorce, acted on his own behalf *in forma pauperis*, and was unable to get citation of the respondent by publication because her whereabouts were unknown to him. As happens in many such cases, he had great difficulty

217. See Joseph W. McKnight, *Commentary on the Texas Family Code, Title 1*, 5 TEX. TECH. L. REV. 281, 332 (1974).

218. *Campsey v. Campsey*, 111 S.W.3d 767 (Tex. App.—Fort Worth 2003, no pet.).

219. "A restricted appeal (like its predecessor, a writ of error) directly attacks a default judgment and prevents [the] courts from indulging in presumption in support of the judgment." *Campsey*, 111 S.W.3d at 770. See also *Grayson v. Grayson*, 103 S.W.3d 559, 561 Tex. App.—San Antonio 2003, no pet.).

220. TEX. R. APP. P. 26.1(c) & 30.

221. *Campsey*, 111 S.W.3d at 770 (citing *Stubbs v. Stubbs*, 685 S.W.2d 269, 270 (Tex. 1997)); *Blankinship v. Blankinship*, 572 S.W.2d 807, 808 (Tex. App.—Houston [14th Dist.] 1978, no writ.).

222. *Campsey*, 111 S.W.3d at 773.

223. *In re Buster*, 115 S.W.3d 141 (Tex. App.—Texarkana 2003, no pet.).

in communicating with the court in which his case was pending and the court, anxious to clear its docket of unprosecuted disputes, dismissed his case under Rule 165a²²⁴ after sixteen months of pleadings. Except for the court's initial response to the petition by entering a protective order as was its practice in all divorce cases, the court had not responded to the prisoner's subsequent pleas. The prisoner appealed the court's dismissal. Acknowledging that the prisoner has no absolute right to be brought before the court in civil actions, the Texarkana Court of Appeals pointed out that the prisoner "should be allowed to proceed by affidavit, deposition, telephone, or other effective means."²²⁵ The court also observed that "the level of reasonable diligence for prison inmates is somewhat longer than that for litigants who are free and represented by counsel."²²⁶ In this instance, the prisoner had sought the right to appear personally, or to have representation by a court-appointed attorney, and "had repeatedly asked for assistance in getting his divorce adjudicated."²²⁷ The appellate court concluded that the trial court had abused its discretion in dismissing the case for want of prosecution.²²⁸ In his concurring opinion Justice Carter suggested that the legislature should consider allowing "video conferencing" of a prisoner with the court of the county where the prison is located.

In commenting on a prisoner's request to attend a paternity hearing against him, the Texas Supreme Court, speaking through Justice O'Neill in *In re Z.L.T.*,²²⁹ enumerated the various factors a court should consider in granting a bench warrant (the writ of *habeas corpus ad testificandum*) for a prisoner's appearance in a civil case. The court stressed that it is the prisoner's "burden to identify with sufficient specificity the grounds" for the ruling sought,²³⁰ including providing "factual information showing why his interest in appearing outweighs the impact on the correctional system."²³¹ The court added that the trial court is not required to make any independent inquiry into the necessity of an inmate's appearance.²³²

5. Deprivation of Counsel

In *Ayati-Ghaffari v. H-Ebrahimi*²³³ the husband's counsel moved to withdraw, and his motion was granted. The court notified the husband that he would have over three weeks' continuance to hire new counsel and that the trial would resume on a certain date. On that day, the husband appeared without counsel and explained that he had been unable to hire counsel because of his inability to pay the attorney's fee but that he

224. TEX. R. CIV. P. 165a.

225. *Buster*, 115 S.W.3d at 144.

226. *Id.*

227. *Id.* at 145.

228. *Id.*

229. *In re Z.L.T.*, 124 S.W.3d 163 (Tex. 2003).

230. *Id.* at 166.

231. *Id.*

232. *Id.*

233. *Ayati-Ghaffari v. H-Ebrahimi*, 109 S.W.3d 915 (Tex. App.—Dallas, 2003, no pet.).

had found a particular lawyer to represent him in a few days hence, when counsel would be paid. The wife's lawyer asked leave to telephone this identified attorney and found that the attorney had not agreed to represent her husband. The court thereupon proceeded to trial and entered a decree. The court denied the husband's motion for a new trial and he appealed on the ground that the court had forced him to trial without counsel. The Dallas appellate court held that in the circumstances the husband had not demonstrated that his failure to find counsel was not due to his own fault or negligence and the court had not therefore abused its discretion in proceeding to trial.²³⁴

6. Receivership

When the divorce was pending in *Norem v. Norem*,²³⁵ the wife complained that her husband was hiding or transferring community assets in violation of the trial court's orders and sought the appointment of a receiver to secure control of stock, warrants, and notes of two corporations (evidently in possession of her husband) and to determine whether he had dealt with these assets in violation of the court's orders. The husband took an interlocutory appeal against the order appointing a receiver. The Dallas Court of Appeals concluded that the corporations (not parties to the suit) were not put in control of the receiver who was appointed merely to secure and to preserve the interest in the corporation under Family Code Section 6.502(a)(5). In such a case "there must be evidence that the receivership is for the protection and preservation of the marital estates"²³⁶ and that evidence supporting these facts had been presented by the wife.²³⁷ In this instance, however, when the receiver was granted the power to control the corporations through the assets he held, the appellate court held that in the absence of evidence of rights stemming from share-ownership, the court's grant of authority to the receiver with respect to control of corporate affairs was too broad.²³⁸

7. Designation of Witnesses

Though the court in *Gutierrez v. Gutierrez*²³⁹ was principally concerned with compliance with the transition provisions of Rule 193,²⁴⁰ the court made it clear that the new rule pertains to supplementation and exclusion of responses to interrogatories. In this instance a party's designation of her attorney as a fact-witness rather than an expert witness did not bar her witness from testifying as an expert if there was no unfair surprise of the other party. Because a party who is not a spouse may be entitled to

234. *Id.* at 917.

235. *Norem v. Norem*, 105 S.W.3d 213 (Tex. App.—Dallas 2003, no pet.).

236. *Id.* at 216.

237. *Id.* at 271.

238. *Id.*

239. *Gutierrez v. Gutierrez*, 86 S.W.3d 729, 734-36 (Tex. App.—El Paso 2003, no pet.).

240. TEX. R. CIV. P. 193.5-6.

attorney's fees,²⁴¹ the same rule would apply to that party's designated witnesses.²⁴²

8. *Right to Jury Trial*

*Walston v. Walston*²⁴³ was a further adjudication in an extremely protracted proceeding in which the wife (not a lawyer) had represented herself. Since 1995 the matter had been the subject of three appeals, ten mandamus proceedings, and other ancillary litigation before the very patient Waco Court of Appeals.²⁴⁴ Two prior appeals had concerned characterization of marital assets and division of those assets. In this appeal, the wife asserted sixteen errors of the trial court in addition to denial of a jury trial with respect to partition of the couple's separate interests in an airplane. Because none of these issues could be resolved by reversal and rendition of the case, the appellate court dealt only with the issue of denial of a jury trial.²⁴⁵ The wife asserted that the trial court on prior remand had failed to retry issues with respect to facts underlying division of the community estate and facts concerned in division of their separate interests in the airplane. The appellate court agreed and therefore held that the wife was entitled to a jury trial to ascertain these facts.²⁴⁶ In a concurring opinion, the judge who had written the opinion of the court added a veiled threat that a motion to recuse the trial judge might be favorably considered if the judge failed to provide "anything less than a careful, studied, textbook-style proceeding."²⁴⁷

9. *Arbitration*

In *Jubri v. Quaddura*²⁴⁸ a premarital agreement (but not one dealing with partition or exchange of the gains of marriage) made provisions for a dowry of the wife in accordance with Islamic custom. The agreement provided that the wife's dowry would include one-half the value of a particular house and \$40,000 to be paid in the future. The agreement also contained a provision that any dispute arising under it would be submitted to a religious organization, the Texas Islamic Court. Six years later the wife sued for divorce and the enforcement of the dowry agreement. The husband's brother was joined in the suit with respect to the right to the house held in his name and the monetary claim involving the funds alleged to be held by him and the husband in a bank account. Another suit was filed by the husband against the wife's parents and all of the parties to both suits signed an interlocutory agreement to arbitrate before

241. *Frazier v. M'Kiernan*, No. 13-01-00004-CV, 2003 WL 22069790 (Tex. App.—Corpus Christi Sept. 4, 2003, no pet.).

242. *Id.* at *3.

243. *Walston v. Walston*, 119 S.W.2d 435 (Tex. App.—Waco 2003, no pet.).

244. Citations to all these proceedings are listed in the opinion. *See id.* at 436.

245. *Id.* at 438.

246. *Id.* at 438-39.

247. *Id.* at 439.

248. *Jubri v. Quaddura*, 108 S.W.3d 404 (Tex. App.—Fort Worth 2003, no pet.).

the Islamic Court for a binding settlement of all claims. After several months, the wife and her parents moved the court to compel arbitration as agreed by all the parties, but they could reach no agreement as to what issues were covered by the agreement. The trial court declined to enter the fray and concluded that the parties' agreement was not binding under the Texas General Arbitration Act.²⁴⁹ The wife and her parents appealed.²⁵⁰ The Fort Worth Court of Appeals held that the agreement to arbitrate was binding according to the parties' expressed intent.

10. Trial Courts' Plenary Power of Disposition

In a number of cases the extent of the trial court's plenary power to rule on particular disputes was in issue. Rule 329b²⁵¹ provides that when a written order granting a new trial is not signed within seventy-five days of judgment, the motion for a new trial is overruled as a matter of law and the trial court's plenary power to deal with the matter expires thirty days thereafter. In *In re Taylor*²⁵² the husband had failed to answer his wife's petition for divorce and the trial court thereupon entered a judgment for divorce. Thereafter the husband made a timely motion to set aside the judgment and to grant a new trial. At the hearing the court granted the motion. The husband's counsel later testified that the proposed order was signed by both parties' counsel and sent to the court. The court's clerk then advised the husband's counsel that the judge had signed the order on a particular day, but upon request the clerk was unable to supply a copy of the signed order. The clerk supplied the wife's counsel a certified copy of the proposed order still unsigned. The husband's counsel then sent another copy of the proposed order to be signed. The time allowed for signing under Rule 329b then expired. Several days later the order was nonetheless signed and dated by the court. The husband then filed a motion to locate the order which his counsel had been advised had been originally signed and to reexecute that order for a new trial as a lost document. A hearing was held on the motion, but the wife did not appear. The husband's counsel repeated prior allegations, but the clerk later had no memory of those matters. The trial court was satisfied that the order granting a new trial had been signed soon after its submission and stated that he signed the order as of the date when the judge recollected that it had been originally signed. The Houston First District Court of Appeals held that although an order granting a new trial is valid if signed after the time specified in Rule 329b(c) for the running of the court's plenary power, the court's further order signed after expiration of the court's plenary power without any proper pleading or any objection by the wife²⁵³ was valid as a reexecution of the lost order²⁵⁴ though the

249. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 *et seq.* (Vernon Supp. 2004).

250. *Jubri*, 108 S.W.3d at 409.

251. TEX. R. CIV. P. 329(c), (e).

252. *In re Taylor*, 113 S.W.3d 385 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

253. *Id.* at 391-92.

254. *Id.* at 392.

previously back-dated order to revive the prior order *nunc pro tunc* was an improper order.²⁵⁵

In *In re Gillespie*²⁵⁶ the Houston Fourteenth District Court of Appeals sitting *en banc* declared²⁵⁷ that only a post-judgment motion seeking a substantive change will extend appellate deadlines and the court's plenary power under Rule 329b(g).²⁵⁸ After the court had lost plenary jurisdiction, the wife made a successful motion to set aside the decree of divorce in order to make additional findings of fact and conclusions of law. The husband sought a writ of mandamus to put aside the court's order. His argument that his request would not extend the court's plenary power prevailed because he did not seek a substantive change.²⁵⁹

In *In re Parker*²⁶⁰ the couple were parties to simultaneous divorce proceedings in Louisiana and Texas. The wife had abandoned the husband and had brought suit in Louisiana where the husband asserted the defense of reconciliation. In his prior Texas suit the husband's case proceeded to judgment first, and a copy of the decree was sent to the wife's lawyer in Louisiana. Thirty nine days after the entry of the judgment the wife moved to vacate the Texas order and her motion was granted. The husband then brought a petition for mandamus to undo that vacation of the decree. There is an exception to the rule on loss of plenary power:²⁶¹ if the adverse party has not received notice of the decree as provided in Rule 306a(3)²⁶² or actual notice of the order, the thirty-day period begins and may run for ninety days after the judgment was signed. Applying this rule, the Texarkana Court of Appeals granted a writ of mandamus on condition that the trial court should fail to vacate the prior disposition of the case.²⁶³ In this instance, however, the trial court had expressed some doubt as to whether the division of property had been achieved because of the conflict of laws question as to whether Texas or Louisiana law should control the division. If the property had been divided in the Texas proceeding, that was the end of the matter in the Texas court. If it had not, the decree was defective in failing to divide the property.²⁶⁴

The wife sought a writ of mandamus in *In re Nguyen*²⁶⁵ to vacate the decree of divorce. The wife had brought her suit for divorce and the

255. *Id.* at 393. In *Powell v. McCauley*, 126 S.W.3d 158 (Tex. App.—Houston [1st Dist.] 2002, no pet.), the court's plenary power to reinstate a judgment on the docket that had been dismissed for want of prosecution was invoked under TEX. R. CIV. P. 306(a)(5) in another situation involving a lost document.

256. *In re Gillespie*, 124 S.W.3d 699 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

257. *Id.* at 702 (overruling *Electronic Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1991, no writ)).

258. TEX. R. CIV. P. § 329b(g).

259. *Gillespie*, 124 S.W.3d at 703.

260. *In re Parker*, 117 S.W.3d 484 (Tex. App.—Texarkana 2003, no pet.).

261. TEX. R. CIV. P. 329b.

262. TEX. R. CIV. P. 306a(3).

263. *Parker*, 117 S.W.3d at 488.

264. *Busby v. Busby*, 457 S.W.2d 551 (Tex.1970).

265. *In re Nguyen*, No. 12-03-00162-CV, 2003 WL 21402503 (Tex. App.—Tyler June 18, 2003, no pet.).

husband was served by publication because his whereabouts were unknown. The court appointed counsel to represent the absent husband and, after a hearing, a decree of divorce was granted. On that same day, the husband filed a motion for a new trial. The court ordered the parties to mediation, but that effort at settlement was unsuccessful. Prior to the running of thirty days from its decree of divorce the court made a written order to schedule hearings, but the court failed to respond to the husband's pending motion. Proceedings were then rescheduled for hearing several months later and the attorneys raised the issue of whether a new trial had been granted. The husband's attorney asserted that there was an entry in the court's docket that a scheduling order had been signed before the running of the thirty days' period and that act had constituted a granting of the motion. But no order to that effect was actually issued in writing as required by Rule 329b(c).²⁶⁶ Hence there was no written order granted within the maximum of 105 days (seventy-five days plus thirty days) allowed.²⁶⁷ The wife sought a writ of mandamus. The Tyler Court of Appeals held that the unsigned and undated entry in the docket did not comply with the rule allowing exercise of plenary power for the motion for new trial, and the appellate court therefore issued its conditional writ of mandamus requiring the trial court to vacate its scheduling order for further proceedings, as the court's plenary power in the matter had previously expired.²⁶⁸

11. Appeal

At the trial of his suit for divorce in *Markowitz v. Markowitz*,²⁶⁹ the appealing husband alleged the judge's bias which he asserted could have been shown by the record of the pretrial hearing but for the failure of the court reporter to transcribe that record. But the husband had failed to object to the judge's comments at the time. Further, he had failed to show that the parties had failed to agree to the record as required by the Rules of Appellate Procedure.²⁷⁰ The husband's arguments were rejected with one judge concurring and taking the position that the husband had failed to an even greater extent in complying with the rules.

The ex-husband in *In re Zavara*²⁷¹ appealed an order of enforcement of a final divorce decree by which he had been ordered to transfer to his ex-wife forty-nine percent of funds and the value of certain securities in a particular account as provided in the couple's mediated property settlement agreement. The amount in dollars inserted in the decree, however, had been had been arrived at without the husband's participation and

266. TEX. R. CIV. P. 329b(c).

267. *Nguyen*, 2003 WL 2140253 at *2 (citing *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993)).

268. *Id.* at *2-3.

269. *Markowitz v. Markowitz*, 118 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

270. *Id.* at 93 (citing TEX. R. APP. P. 34.6(f)(4)).

271. *In re Zavara*, 131 S.W.3d 566 (Tex. App.—Texarkana 2004, no pet.).

amounted to fifty percent.²⁷² The appellate court merely modified the judgment to reflect forty-nine percent and rendered judgment for that amount without the need of remanding the case to the trial court for the "correction of a simple computational error"²⁷³ under *Jacobs v. Jacobs*.²⁷⁴

B. DIVIDING THE PROPERTY

1. Property Settlement Agreements

In negotiating the terms of a property settlement agreement, a principal concern is to avoid post-divorce disputes with respect to the terms of the agreement, though a party who asks the trial court to accept a settlement agreement and to incorporate it into the divorce decree may not later attack the judgment on appeal as grounded in the court's erroneous rulings on any matter other than jurisdiction.²⁷⁵ In order to preserve error on appeal, a party who signs a judgment must specify that he agrees merely in form and not as to substance or outcome.²⁷⁶ If a property settlement is declared not just and right by the trial court, it loses its contractual effect completely.²⁷⁷

The divorcing couple in *Alford v. Thornburg*²⁷⁸ sought to achieve a property settlement in anticipation of their divorce. The source of funds which the couple used for this purpose was an irrevocable trust of which the husband was a beneficiary. It was agreed that the trustee would be directed to pay the wife \$85,000 from the corpus of this irrevocable trust set up by the husband's stepmother to be funded at her death. The husband executed a lien on the funds and an assignment of them should he die prior to his receipt of the inheritance. The divorce decree embodied this property settlement. After the divorce, the ex-husband contested the validity of the settlement agreement and that dispute was resolved in favor of the ex-wife.²⁷⁹ The husband thereupon filed a petition in bankruptcy, in which proceedings the ex-wife participated in order to protect her interest in a policy of insurance on the husband's life which he had agreed to maintain as part of the settlement.²⁸⁰ In the meantime, the trustee of the trust, at its situs in California, had brought suit there for

272. *Id.* at 568-69.

273. *Zavara*, 131 S.W.3d at 570.

274. *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985); *see also In re Scott*, 117 S.W.3d 580, 585 (Tex. App.—Amarillo 2003, no pet.).

275. *Mailhot v. Mailhot*, 124 S.W.2d 775, 777 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

276. *Id.* (citing *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989)).

277. *See Markowitz v. Markowitz*, 118 S.W.3d 82, 88 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

278. *Alford v. Thornburg*, 113 S.W.3d 575 (Tex. App.—Texarkana 2003, no pet.).

279. *See In re Thornburg*, 946 S.W.2d 97 (Tex. App.—Texarkana 1997, no writ), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 51 SMU L. REV. 1047, 1075 (1998).

280. *See In re Thornburg*, 277 B.R. 719 (Bankr. E.D. Tex. 2002), commented on in Joseph W. McKnight, *Family Law: Husband and Wife*, 56 SMU L. REV. 1659, 1701 (2003). Just for good measure, the parties also contested the specificity of terms of the divorce decree with respect to airline reward-miles in *In re Alford*, 40 S.W.3d 187 (Tex. App.—

determination of the validity of the husband's assignment in light of a spendthrift provision in the trust of which the wife had not been aware when the settlement agreement was negotiated. The California court declared the assignment invalid, and the ex-wife brought suit against her ex-husband for fraud and conspiracy in the negotiation of the settlement agreement. That dispute was partially resolved by a decision²⁸¹ of the Texarkana Court of Appeals that the ex-wife had not proved conspiracy between the ex-husband and the trustee,²⁸² but the ex-husband was not entitled to summary judgment on the claim of fraud because of fact questions at issue.²⁸³

The parties in *Mosk v. Thomas*²⁸⁴ entered into a mediated property settlement under Rule 11.²⁸⁵ Two months after the divorce the ex-husband sought to alter the terms of the agreements which provided that the wife would have a third lien on particular land awarded to the husband. The agreement further provided that if the property should be sold the ex-husband would "replace the collateral with a lien of equal stature on the replacement property acquired by him."²⁸⁶ Having negotiated a sale of the property, the ex-husband notified the ex-wife of his desire to substitute a first lien on his 1995 Toyota automobile. On her refusal to release the lien on the land, the purchaser of the property sued the ex-husband for breach of his contract of sale, the ex-husband sued his ex-wife for violation of the Deceptive Trade Practices Act, and she counterclaimed for her attorney's fees in defending the DTPA suit. The trial court granted the purchaser a judgment against the ex-husband. The purchaser recovered damages in his action and the ex-wife was awarded restitution for her attorney's fees in defending the groundless DTPA suit.²⁸⁷ The ex-husband was not a "consumer" under the DTPA.²⁸⁸

2. Valuation

After a couple's assets have been identified for division, the assets must be valued. Sufficient identification and valuation of all divisible property must be put in evidence on the record.²⁸⁹ Finding of facts on valuation,

Texarkana 2001, no pet.), briefly discussed in Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1035, 1072-73 (2002).

281. Alford v. Thornburg, 113 S.W.3d 575 (Tex. App.—Texarkana 2003, no pet.).

282. *Id.* at 588.

283. *Id.* at 587-88.

284. Mosk v. Thomas, No. 14-02-01130-CV, 2003 WL 22901046 (Tex. App.—Houston [14th Dist.] Dec. 4, 2003, no pet.).

285. TEX. R. CIV. P. Rule 11.

286. Mosk, 2003 WL 22901046 at *1.

287. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 2002).

288. *Id.* at § 17.45(4) (Vernon 2002).

289. See Handley v. Handley, 122 S.W.3d 904, 908 (Tex. App.—Corpus Christ 2003, no pet.). See also R.V.K. v. L.L.K., 103 S.W.3d 612, 615-23 (Tex. App.—San Antonio 2003, no pet.), and Markowitz v. Markowitz, 118 S.W.3d 82, 91 (Tex. App.—Houston [14th Dist.] 2003, no pet.), on sufficiency of evidence on revaluation of medical practices and the former on sealing orders with respect to valuation-testimony. R.V.K., 103 S.W.3d at 614-15.

however, are not appropriately included in the judgment.²⁹⁰ As necessary, the parties must be assisted by qualified experts to value the property.²⁹¹ In *Sandone v. Miller-Sandone*²⁹² the husband, who had failed to file an answer or to appear at the trial appealed with respect to division of the community property. The wife had offered neither pleadings nor evidence with respect to the value of the assets or the amount of the liabilities.²⁹³ The El Paso appellate court held that the trial court must have some basis in the evidence in order to make its division of property. "The statute requires the petitioner to present proof to support the material allegations in the petition despite the respondent's failure to answer."²⁹⁴ In making the division without hearing any evidence the trial court therefore abused its discretion in its disposition of the property and apportioning debts, as well as in its award of attorney's fees unsupported by pleading or evidence.²⁹⁵ In *In re Scott*²⁹⁶ the Amarillo court concluded that the trial court's valuation of the family home based solely on a very low appraisal of the *ad valorem* taxing authorities as compared to vastly higher valuation based on other evidence caused the valuation to be clearly wrong and probably caused rendition of an improper division of property requiring remand.²⁹⁷

3. Making the Division

Successful appeals for the trial court's abuse of discretion in making equitable division of community property are rare and unsuccessful efforts to that end are worthy of mention only to illustrate that fact.²⁹⁸ But for the court to order sale of the divisible estate rather than to make a division in kind for no better reason than the court's convenience or impatience is not only a gross abuse of the judicial office but also one that a party cannot effectively contest once the sale of the property has been conducted,²⁹⁹ though in this instance neither party requested a stay of the order appointing the receiver pending an appeal. This after-the-fact suggestion and the fact that such abuses may be sanctioned by the Texas Judicial Conduct Commission are cool comfort to the victims of such wrongdoing.³⁰⁰

290. See *Lafresen v. Lafresen*, 106 S.W.3d 876, 878 (Tex. App.—Dallas 2003, no pet.).

291. See *In re Rice*, 96 S.W.3d 642, 645 (Tex. App.—Dallas 2003, no pet.); *Frazier v. McKiernan*, No. 13-01-00004-CV, 2003 WL 22069790 *2 (Tex. App.—Corpus Christi Sept. 4, 2003, no pet.).

292. *Sandone v. Miller-Sandone*, 116 S.W.3d 204 (Tex. App.—El Paso 2003, no pet.).

293. *Id.* at 207.

294. *Id.* (citing *O'Neal v. O'Neal*, 69 S.W.3d 347, 349 (Tex. App.—Eastland 2002, no pet.), dealing with "virtually identical" facts, noted in Joseph W. McKnight, *Family Law: Husband & Wife*, 56 SMU L. REV. 1659, 1695 (2002)).

295. *Id.* at 208.

296. *In re Scott*, 117 S.W.3d 580 (Tex. App.—Amarillo 2003, no pet.).

297. *Id.* at 584-85.

298. *In re Rice*, 96 S.W.3d 642 (Tex. App.—Texarkana 2003, no pet.).

299. *In re Edwards*, 79 S.W.3d 88, 97 (Tex. App.—Texarkana 2002, no pet.).

300. As suggested in John J. Sampson, *Comment* [on *Edwards*] 2003-1 STATE BAR OF TEXAS SECTION REPORT FAMILY LAW 11-12.

A divorce court, of course, may not award any part of the separate property of one spouse to the other.³⁰¹ But the court's exercise of its good judgment in making the division of community property may be raised even though, pending appeal, the parties had divided other property in a manner different from that directed by the trial court.³⁰²

Although a power to allocate debts between spouses is not granted to the divorce court by statute, directing either spouse to pay mutual debts (or debts incurred unilaterally by the other spouse for the support of the family) has long been considered a proper means of achieving a just and right division of the community estate. *Handley v. Handley*³⁰³ illustrates this point though the court incongruously speaks in terms of an "award" to the husband to pay debts incurred mutually.

C. MAINTENANCE FOR THE OTHER SPOUSE

Ex-spousal maintenance is not to be used as a substitute for division of community property.³⁰⁴ Nor is provision for maintenance justified if an award of community property is sufficient for the ex-spouse to provide for reasonable needs, a determination under Section 8.051³⁰⁵ that is outside the province of a jury.³⁰⁶ But if after division of the property, the needs of the other spouse are such that further provision for maintenance-needs should be made, an award of maintenance is proper. In *Smith v. Smith*,³⁰⁷ the ex-husband's serious physical condition and inability to support himself supplied that need.

The duty of support cannot extend for over three years under Sections 154.061 and 154.062 in any case.³⁰⁸ Although a change of circumstances may be shown by the ex-spouse being ordered to pay for maintenance of the other, and "minimum reasonable needs"³⁰⁹ are determined simply as a matter of fact,³¹⁰ a mere finding of disability to indicate need was not a sufficient showing of fact in *Carlin v. Carlin*³¹¹ to establish actual need for the purpose of ex-spousal maintenance. The San Antonio Court of Appeals evidently had some difficulty in determining a proper standard in such an instance when the ex-wife sought to have her payments for her

301. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1997).

302. *Alsenz v. Alsenz*, 101 S.W. 3d 648, 651 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

303. *Handley v. Handley*, 122 S.W.3d 904, 910 (Tex. App.—Corpus Christi 2003, no pet.).

304. *O'Carolan v. O'Carolan*, 71 S.W.3d 529 (Tex. App.—Austin 2002, no pet.), noted in Joseph W. McKnight, *Family Law: Husband & Wife*, 56 SMU L. REV. 1659, 1698 (2002).

305. TEX. FAM. CODE ANN. § 8.051 (Vernon Supp. 2004). In 2003 the Texas Legislature added Section 8.055(d) to define "gross income" as defined in Section 154.062(b), (c).

306. *Kennedy v. Kennedy*, 125 S.W.3d 14, 21 (Tex. App.—Austin 2002, no pet.).

307. *Smith v. Smith*, 118 S.W.3d 303 (Tex. App.—Corpus Christi 2003, no pet.).

308. *Deltuva v. Deltuva*, 113 S.W.3d 882 (Tex. App.—Dallas 2003, no pet.).

309. TEX. FAM. CODE ANN. § 8.051(2) (Vernon 1998).

310. *See Stone v. Stone*, 119 S.W.3d 866, 868 [Tex. App.—Eastland 2003, no pet.).

311. *Carlin v. Carlin*, 92 S.W.3d 902, 905 (Tex. App.—Beaumont 2002, no pet.).

ex-husband's needs reduced.³¹²

D. CLARIFICATION AND ENFORCEMENT

Almost simultaneously another pair of related family law cases prompted a division of opinion in the Texas Supreme Court.³¹³ *Shanks v. Treadway*³¹⁴ and *Reiss v. Reiss*³¹⁵ presented similar questions of interpretation of two divorce decrees dating from the early 1980s. *Shanks* dealt with a decree of 1981 awarding the non-employee "[twenty-five percent] of the total sum or sums paid or to be paid to [the husband] from such pension or retirement plan." When he was about to retire in 1998, the ex-husband sought a qualified domestic relations order (QDRO) calculating the value of his defined benefit and defined contribution plans. The trial court valued and divided the benefits as of the date of divorce and the wife appealed. The Dallas Court of Appeals held³¹⁶ that the trial court unambiguously awarded the ex-wife "a twenty-five percent interest in the 'total sum or sums paid or to be paid'" from the ex-husband's retirement benefits and did not "limit her award to a percentage of the benefits accrued in the plans prior to the divorce."³¹⁷ The Texas Supreme Court affirmed that decision.³¹⁸ In doing so the court pointed out that the divorce court was dealing with the law as it stood under *Cearley v. Cearley*,³¹⁹ in which the court had decided that future unvested pension rights were subject to division upon divorce, and *Taggart v. Taggart*,³²⁰ in which the court had provided a formula for dividing community interest in such cases. The trial court in *Shanks* should have used that formula though without the insertion of the actual amounts to be divided which could not have been known until the ex-husband retired. The trial court did not do so but stated that the ex-husband's pension interest arose out of his past employment and awarded the ex-wife a pro rata interest in the full amount the husband would receive rather than his interest accrued at the date of divorce,³²¹ as specified in the later decision of the Texas Supreme Court in *Berry v. Berry*.³²² No appeal was taken from the divorce court's order in *Shanks*, and therefore the attack the ex-husband made on that decision was thus a collateral and not a direct attack on the judg-

312. *Tyler v. Talburt*, No. 040200245CV, 2003 WL 1964186 (Tex. App.—San Antonio Apr. 30, 2003, no pet.).

313. Four years ago a group of such cases appeared together. *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999); *Schleuter v. Schleuter*, 975 S.W.2d 584 (Tex. 1998); and *Vickery & Richards v. Vickery*, 999 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1997, pet. denied), discussed together in Joseph W. McKnight, *Family Law: Husband & Wife*, 53 SMU L. REV. 995, 1003 (2000).

314. *Treadway v. Shanks*, 110 S.W.3d 444 (Tex. 2003).

315. *Reiss v. Reiss*, 118 S.W.3d 439 (Tex. 2003).

316. *Shanks*, 110 S.W.3d 1, 3 (Tex. App.—Dallas 2003, pet. granted).

317. *Id.* at 6.

318. *Shanks*, 118 S.W.3d at 446.

319. *Cearley v. Cearley*, 544 S.W.2d 661, 663-64 (Tex. 1976).

320. *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977).

321. *Shanks*, S.W.3d at 448.

322. *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983).

ment. The Texas Supreme Court pointed out that the way the divorce court's order was written "would probably divest [the ex-husband] of a portion of his separate property" under the rule in *Berry v. Berry*,³²³ but its terms were unambiguous and therefore must stand when subjected to a collateral attack.³²⁴ The substantive division of the property could not be changed.³²⁵

In the view of a majority of the Texas Supreme Court, *Reiss v. Reiss* presented it with the problem of interpreting very similar language of a 1980 divorce decree.³²⁶ There the divorce court failed to apportion the community interest in the husband's retirement benefits using the formula in *Taggart* but awarded the wife one-half of the total benefits of his retirement as community property, thereby mistakenly (but unambiguously) characterizing the husband's separate interest in the plan as community property. Three other judges construed the divorce decree as dissimilar to that interpreted in *Shanks* and, therefore, as applying only to the husband's community interest in his retirement benefits.³²⁷ Though the ex-husband had argued that the divorce court's order was not valid as it unconstitutionally deprived him of separate property, the majority of the court appropriately pointed out that in this collateral attack it must be treated as valid.³²⁸

E. EFFECTS OF POST-DIVORCE BANKRUPTCY

In *Addington v. Addington*³²⁹ the debtor had violated a bankruptcy court's order by failing to comply with a property settlement agreement with his ex-wife. He then appealed the order to district court, which in turn affirmed the bankruptcy court's subject matter jurisdiction to enforce the agreement. The ex-husband did not appeal further. On a later motion by the ex-wife, the federal district court found the debtor in civil contempt for failure to comply and ordered him to pay her attorney's fees in connection with that proceeding. Contesting the bankruptcy court's subject matter jurisdiction, the ex-husband appealed to the Fifth Circuit Court of Appeals which held that his challenge amounted to a collateral attack on the district court's prior ruling and affirmed the finding of contempt.

The ex-wife in *In re Carbaugh*³³⁰ attempted to have her former hus-

323. *Berry*, 647 S.W.2d at 947.

324. *Shanks*, 110 S.W.3d at 448-49.

325. *Id.* at 449.

326. *Reiss v. Reiss*, 118 S.W. 439, 441 (Tex. 2003), decided the same day as *Shanks*.

327. *Id.* at 443-45.

328. *Id.* at 443. In his prior comments on *Reiss v. Reiss*, 40 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2001, writ granted) and noted in Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. REV. 1036, 1072 (2002) and Joseph W. McKnight, *Family Law: Husband and Wife*, 54 SMU L. REV. 1386, 1411-12 (2001), the author misread the obviously incorrect holding of the court of appeals to anticipate the holding of the Texas Supreme Court two years later.

329. *Addington v. Addington*, 77 F.3d 282 (5th Cir. 2003).

330. *In re Carbaugh*, 299 B.R. 395 (Bankr. N.D. Tex. 2003).

band's Chapter 7 bankruptcy proceeding dismissed for "bad faith" under the Bankruptcy Code.³³¹ The court agreed that bad faith could suffice as cause for dismissal, albeit the facts must be "extraordinary to justify the dismissal."³³² The ex-wife, however, was unable to prove that the Chapter 7 filing was maliciously motivated and her motion was denied.³³³

Within a year of a decree of divorce, the ex-wife in *In re Erlewine*³³⁴ filed for bankruptcy under Chapter 7. The bankruptcy trustee thereupon moved to set aside the unequal division of property by the divorce court and asserted that the division had caused the debtor-spouse to receive "less than a reasonably equivalent value in exchange" under such transfer.³³⁵ Relying heavily on *In re Besing*³³⁶ the bankruptcy court rejected her argument. In *Besing*,³³⁷ a trial court had dismissed the debtor's tort claim as a sanction for discovery abuse. Three months later the debtor attempted to have his claim reinstated during a Chapter 11 bankruptcy proceeding by arguing that the dismissal amounted to a fraudulent transfer of property for nothing in return. The Fifth Circuit Court of Appeals held that because Texas law regards the dismissal as an adjudication on the merits, there was a transfer in exchange for reasonably equivalent value as a matter of law.

The Fifth Circuit Court also held in *Erlewine*³³⁸ that the property division, although disproportionate, was a disposition of the non-debtor-spouse's claim on the merits and thus a transfer in exchange for reasonably equivalent value. This was not a case where the debtor-spouse agreed or volunteered to take a smaller portion of community assets in order to shrink her bankruptcy estate.³³⁹ The debtor-spouse received a smaller share from the divorce court because she had wasted community assets on drugs.³⁴⁰

In her bankruptcy proceeding in *In re Evert*,³⁴¹ the ex-wife attempted to claim as exempt property a \$65,000 promissory note payable by her ex-husband as part of a property division on divorce. Applying the reasoning of the Fifth Circuit court in *In re Nunnally*,³⁴² that a Texas divorce court's division of property may be termed "an alimony substitute," the bankruptcy court concluded that the note was in the nature of alimony and therefore not includable in her bankruptcy estate.³⁴³ The district

331. 11 U.S.C. § 707(a).

332. *Id.* at 399.

333. *Id.* at 400.

334. *In re Erlewine*, 349 F.3d 206 (5th Cir. 2003).

335. 11 U.S.C. § 548(a)(1)(B)(i).

336. *In re Besing*, 981 F.2d 1488 (5th Cir. 1993).

337. *Id.* at 1495-96.

338. *Erlewine*, 349 F.3d at 213.

339. *Id.* at 212.

340. *Id.* at 207-208.

341. *In re Evert*, 342 F.3d 358 (5th Cir. 2003).

342. *In re Nunnally*, 506 F.2d 1024, 1027 (5th Cir. 1975); see also *In re Joseph*, 16 F.3d 86 (1994) and *In re Dennis*, 25 F.3d 274 (5th Cir. 1994). See Joseph W. McKnight, *Family Law: Husband & Wife*, 36 Sw. L.J. 97, 153 (1982).

343. 11 U.S.C. § 522(d)(10)(D).

court affirmed. The Fifth Circuit Court of Appeals reversed, holding that the note was, in this instance, not for support (which was otherwise provided) and therefore it was subject to the rights of her creditors.

The appellate court questioned the bankruptcy court's application of *Nunnally* as a test for determining the note's inclusion in the bankruptcy estate, because in *Nunnally* the issue was whether an obligation to an ex-spouse was dischargeable under Section 523(a)(5) of the Bankruptcy Code.³⁴⁴ Noting differences between the agreed divorce judgment's provisions for division of property and those describable as alimony,³⁴⁵ as well as the change of Texas law which has since the decision in *Nunnally* allowed limited ex-spousal maintenance,³⁴⁶ the federal appellate court reached the conclusion that the *Nunnally* precedent was inapplicable to this situation³⁴⁷ to define the ultimate content of the bankruptcy estate.

344. *Nunnally*, 342 F.3d at 366.

345. *Id.* at 368-370.

346. *Id.* at 369.

347. *Id.* at 368, 370.